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SHOW PROCEEDINGS AND ORDERS DATE: [07/02/96

CASE NBR: [95101738] CSY STATUS: [DECIDED

SHORT TITLE: [Pennsylvania]

VERSUS [Kilgore, Randy] DATE DOCKETED: [042696]

PAGE: [01

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 23 1996		Petition for writ of certiorari filed. (Response due May 26, 1996)
May 17 1996		Brief of respondent Randy Lee Kilgore in opposition filed.
May 29 1996		DISTRIBUTED. June 14, 1996
Jun 17 1996		REDISTRIBUTED. June 21, 1996
Jun 21 1996		REDISTRIBUTED. June 28, 1996
Jul 1 1996		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens with whom Justice Ginsburg joins. Opinion per curiam.

****

95-1738

APR 23 1996
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RANDY LEE KILGORE,
Respondent

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED

Has the Pennsylvania Supreme Court properly understood this Court's precedent in declaring that police who have probable cause to search an automobile must instead "secure" the vehicle and send other officers to obtain a warrant?

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OPINIONS BELOW

The January 24, 1996 judgment and opinion of the Supreme Court of Pennsylvania, reversing the judgment of the intermediate appellate court, the Superior Court of Pennsylvania, is reported at 1995 WL 790060 (Pa. 1995), and is reprinted in the Appendix at App. 1-16.[1] The November 23, 1994 judgment and opinion of the Superior Court of Pennsylvania, reported at 437 Pa. Super. 491, 650 A.2d 462 (1994), is reprinted in the Appendix at App. 17-30. The March 1, 1993 opinion of the Court of Common Pleas of York County is unreported, but is reprinted in the Appendix at App. 31-41.

STATEMENT OF JURISDICTION

This is a state criminal prosecution where respondent filed a motion in the trial court, the York County Court of Common Pleas, seeking to suppress cocaine on the ground that it was seized from a truck in violation of the Fourth and Fourteenth Amendments of the United States Constitution. On October 1, 1991, the trial court declined to suppress the evidence, finding that the warrantless seizure was supported by probable cause and hence, was lawful. Respondent was subsequently convicted.

Upon appeal by respondent, the intermediate state appellate court, the Superior Court of Pennsylvania, affirmed the conviction, upholding the suppression order in a judgment and opinion dated November 23, 1994.

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[1]The Court's opinion shows a filing date of December 26, 1995, but judgment was not entered, and the opinion was not issued, until January 24, 1996.

Respondent filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. On May 11, 1995, the supreme court granted the petition for allowance of appeal. After briefing and oral argument, the court reversed the decision of the superior court, holding that, under the "automobile exception" derived from this Court's Fourth Amendment case law, a police officer who develops probable cause to believe that contraband is in a vehicle must nevertheless "secure" the vehicle and send other officers to obtain a search warrant before conducting a search. Accordingly, the court concluded, "the search of [respondent's] vehicle was conducted in a manner which violated his rights under the Fourth Amendment." App. 8.

The jurisdiction of this Court to review the final judgment of the Supreme Court of Pennsylvania, based upon its construction of the federal Fourth Amendment, is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of Section 1 of the Fourteenth amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case is one of a series of recent decisions in which the Pennsylvania Supreme Court has held, on the basis of Fourth Amendment precedent, that an automobile cannot be searched without either a warrant or a case-by-case showing that exigent circumstances -- beyond the inherent mobility of the vehicle -- prevented the securing of a warrant.

The case involves the search of a truck parked at a farmhouse in York County, Pennsylvania, on a Saturday night over the July 4th holiday weekend. A police informant had negotiated through respondent's ex-wife, Kelly Kilgore, to purchase one-eighth of a kilogram (four and one-half ounces) of cocaine. Under police supervision, the informant met Ms. Kilgore in the parking lot of a general store near her father's farm.

The two agreed that Ms. Kilgore would first provide a one-ounce "sample" of the cocaine for $1,300 before the informant's "customer" purchased the balance. Ms. Kilgore took the $1,300 and left in her car to get the "sample". App. 44-47.

An undercover officer followed her to the driveway of the family farmhouse, where she was met by her ex-husband, respondent. Respondent and Ms. Kilgore then walked together to respondent's truck, parked some distance from the house. The investigating officer drove past the farmhouse and made a U-turn. When he again drove by the farmhouse minutes later, he saw respondent and Ms. Kilgore walking away from respondent's truck.

Ms. Kilgore got in her car and returned to the general store, where she delivered an ounce of cocaine

to the informant. App. 55-56. She was immediately arrested and taken to her father's farmhouse. A search of her person produced a small amount of cocaine and drug paraphernalia, but did not uncover either the $1,300 just paid to her by the informant or the cocaine yet to be delivered under the negotiated deal. Ms. Kilgore's father consented to a search of the farmhouse and out-buildings. That search also failed to uncover the money and drugs.

Because they had seen respondent and his ex-wife go to the truck, the police searched the vehicle for the cocaine that was to be delivered. On the floor they found three and one-half ounces of cocaine hidden in a disposable coffee cup. Respondent then admitted to the police that he had hidden the informant's $1,300 drug payment under the living room rug in the farmhouse. App. 47-49, 51, 57-58. Respondent was charged with possession, delivery and possession with the intent to deliver a controlled substance, 35 Pa.C.S. § 780-113(a)(16), (a)(30), and criminal conspiracy, 18 Pa.C.S. § 903.

Respondent moved to suppress the drugs, arguing that the warrantless search of his truck was unlawful. App. 59.At the suppression hearing on October 1, 1991, respondent presented no evidence, and the investigating officers' testimony remained uncontradicted. The suppression court credited the officers' testimony and denied respondent's suppression motion, concluding that, because the police had probable cause to believe that there were cocaine and drug proceeds in the truck, "there was no need for a search warrant." App. 60.

Petitioner appealed to the intermediate state appellate court, the Superior Court of Pennsylvania. On November 23, 1994, the superior court affirmed the

suppression order and issued an opinion explaining that, under the "automobile exception," once "probable cause exists, the police are not required to watch over or immobilize a vehicle while a search warrant is obtained." App. 24; Commonwealth v. Kilgore, 437 Pa. Super. 491, 497, 650 A.2d 462, 465 (1994).

Respondent petitioned for discretionary review. The state supreme court granted review in this case and two other unrelated cases involving the "automobile exception." The state court then held in each of the three cases that the Fourth Amendment's "automobile exception" required not only probable cause for the search, but also proof that the police did not have time or opportunity to get a warrant. That burden was not met here, the court held, because the police should have waited at this rural location until other officers searched out a magistrate to issue a warrant. App. 7-8; Commonwealth v. Kilgore, 1995 WL 790060 at p. 3.[2]

Because of the court's insistence that the "automobile exception" precludes a search until officers place the vehicle under police guard, while other officers go off to seek a warrant, petitioner filed this petition for writ of certiorari.

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[2]The other cases in the trilogy are Commonwealth v. Labron, 669 A.2d 917 (Pa., opinion dated December 29, 1995, judgment entered January 12, 1996), and Commonwealth v. White, 669 A.2d 896 (Pa., opinion dated December 29, 1995, judgment entered January 4, 1996).

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court has effectively abrogated the "automobile exception" by declaring -- in reliance on this Court's Fourth Amendment jurisprudence -- that police acting with probable cause may not search a motor vehicle but must instead "secure" the vehicle and send other officers to obtain a warrant.

The decision below -- one of a trilogy of recent "automobile exception" cases wrongly decided by the Pennsylvania Supreme Court -- purports to apply the "automobile exception" to the Fourth Amendment but turns seventy years of constitutional automobile-search jurisprudence on its head.

Over those many years, this Court has repeatedly held that, because motor vehicles are inherently mobile and because citizens enjoy a substantially diminished expectation of privacy in their automobiles, warrantless car searches are permitted upon a demonstration of probable cause without more.

The Pennsylvania Supreme Court has completely eviscerated that principle. Purporting to interpret the Fourth Amendment, it held in this case and the two others that probable cause alone is insufficient as a matter of law to justify a warrantless car search.

The police here unquestionably had such probable cause. They negotiated a cocaine sale to be consummated after delivery of payment and provision of a "sample" of the drug. Respondent's intermediary brought the money to a farmhouse, walked with him to

a truck, and moments later returned to the police agent with the agreed cocaine "sample." Searches of the intermediary and (upon the owner's consent) of the farmhouse, failed to turn up either money or drugs. The police, reasonably believing that the contraband was inside respondent's truck, seized the drugs from the truck rather than leaving the vehicle for several more hours to secure a warrant. The officers' conduct was in complete accord with this Court's Fourth Amendment interpretations.

Yet the Pennsylvania Supreme Court, although acknowledging the existence of probable cause, ruled that this was not enough. The court stated that the automobile exception requires the showing of exigent circumstances beyond the inherent mobility of the vehicle itself. No such exigency could exist here, held the court, because the police could have posted guard at the farm while they went off, on the Saturday night of the July 4th weekend, to find a magistrate and secure a warrant.

That interpretation of the Fourth Amendment is flatly wrong. This Court has left no room for argument on the question: a warrantless car search is proper under the Fourth Amendment if it is made with probable cause. There is no need to first impound the vehicle or demonstrate an inability to obtain a warrant.

Thus, in California v. Carney, 471 U.S. 386 (1985), when a government agent developed information about a motor home being used for illicit purposes, conducted surveillance, corroborated his information, and entered the vehicle without a warrant, this Court held that the warrantless entry was perfectly proper under the "automobile exception" because the agent had probable cause.

There is no meaningful distinction between Carney and the present case. The police there, as here, had probable cause to believe that a vehicle was being used in criminal activity and they conducted a warrantless search based on a showing of probable cause alone. No guard was posted; no exigent circumstances, beyond the inherent mobility of motor vehicles, were shown. Because the "automobile exception" did not require these things, the warrantless search was upheld. The result should have been the same here but was not simply because the Pennsylvania Supreme Court misunderstands Fourth Amendment jurisprudence.

This Court's holding in United States v. Ross, 456 U.S. 798, 807 (1982), further demonstrates the Pennsylvania Supreme Court's erroneous view. In Ross, the police received a tip from an informant and went to the targeted location, where they found Ross selling drugs from the trunk of a car. They arrested Ross and immediately searched his car and its trunk. After finding drugs in a container in the trunk, the police transported the car to a police station and searched it again. This time they found a quantity of cash in another container.

Relying on the "automobile exception," this Court upheld the warrantless search of both the car and the containers at both locations because they were supported by probable cause. There was no impoundment or special exigency. If the warrantless search in Ross was valid under the "automobile exception" upon a showing of probable cause alone, so was the search in this case.

The holdings in Carney and Ross are not extraordinary; they are but two examples of this Court's long-standing view -- going back to Carroll v. United

States, 267 U.S. 132 (1925) -- that, because citizens have a diminished expectation of privacy in their automobiles, and because automobiles are inherently mobile, the Fourth Amendment permits police officers to conduct warrantless car searches as long as they have probable cause. See United States v. Johns, 469 U.S. 478, 484 (1985) ("A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search"); Michigan v. Thomas, 458 U.S. 259 (1982) (right to conduct warrantless search of automobile with probable cause does not "depend upon a reviewing court's assessment in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant"); Texas v. White, 423 U.S. 67 (1975) (warrantless car search at police station upon probable cause held proper); Cardwell v. Lewis, 417 U.S. 583 (1974) (under "automobile exception," probable cause allowed for warrantless search without proof of articulable exigency); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of impounded vehicle upheld under "automobile exception" based on showing of probable cause).

This principle simply cannot be defeated by a claim that the police must guard the car, without searching it, while they send out for a warrant. The Court has made absolutely plain that, as a constitutional matter, there is no difference between immediately searching a vehicle at the scene or impounding the car while an officer seeks a warrant. Texas v. White; Chambers v. Maroney. Either course is "reasonable

under the Fourth Amendment."[3] It is the existence of probable cause to search the automobile, without showing specific exigencies, that satisfies the Constitution.[4]

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[3]Nor does it matter if the automobile is, as here, already immobile before the police arrived. Colorado v. Bannister, 449 U.S. 1 (1980) (automobile exception applies even where the police never see vehicle in actual motion).

[4]The federal courts of appeal, unlike the Pennsylvania Supreme Court, have had little trouble applying this clear case law, and have regularly rejected attempts to graft onto the "automobile exception" the extra requirement erroneously pronounced here. See United States v. Jones, 31 F.3d 1304 (4th Cir. 1994) (warrantless search of automobile justified with probable cause even though officers had advance information about truck before conducting search); United States v. Hatley, 15 F.3d 856 (9th Cir. 1994) (as long as warrantless car search based on probable cause, no further exigency need be shown); United States v. Markham, 844 F.2d 366, 368 (6th Cir. 1988) (police do not have to show inability to obtain warrant; Fourth Amendment allows search on showing of probable cause alone); United States v. Cruz, 834 F.2d 47 (2d Cir. 1987) (where agents develop probable cause, arrest owner of truck and search truck two hours later without a warrant, search permitted under "automobile exception"); United States v. Swingler, 758 F.2d 477 (10th Cir. 1985) (view that "automobile exception" applies only when there are exigent circumstances "has never been endorsed by the [United States] Supreme Court and is, in fact, inconsistent with that Court's development of the exception").

Clearly, the Pennsylvania Supreme Court has interpreted the automobile exception in a manner wholly inconsistent with this Court's development of the exception. It is difficult to imagine a situation where an impoundment requirement could not be invoked. Even as to a vehicle that is actually in motion when probable cause is developed, the police will not be in a position to conduct a search until they have effected a stop. Once that occurs, however, the logic of the Pennsylvania Supreme Court would mandate the posting of guards while other officers go off in search of a warrant. Indeed, the court applied such a requirement in this case to a search in a rural area on a holiday weekend night -- a place and time when magistrates will hardly be readily available. If the possibility of impoundment is sufficient to defeat the automobile exception, then the exception has ceased to exist.

The court reached this retrogressive result in explicit reliance on the Fourth Amendment, but without any appropriate analysis. Instead, the court merely referred to two Pennsylvania cases decided more than two decades ago -- each purporting to apply federal precedent -- for the false proposition that, where the police, armed with probable cause, do not demonstrate an exigency beyond the inherent mobility of the vehicle, their failure to obtain a search warrant invalidates their automobile search. App. 5-7.[5] The opinion below

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[5] Commonwealth v. Cockfield, 431 Pa. 639, 644, 246 A.2d 381, 384 (1968), cited Chapman v. United States, 365 U.S. 610 (1961). Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62, cert. denied, 409 U.S. 1031 (1972), cited Chambers v. Maroney, 399 U.S. 42 (1970) and Coolidge v. New Hampshire, 400 U.S. 814 (1971).

(continued...)

made no attempt to square its notion of federal constitutional requirements with this Court's actual body of law on the automobile exception.

As mentioned above, the Pennsylvania Supreme Court's misreading of the "automobile exception" is not an anomaly limited to this one case. Indeed, within three days of the decision here, the court similarly decided two other "automobile exception" cases. In both Commonwealth v. Labron, 669 A.2d 917 (Pa. 1995), and Commonwealth v. White, 669 A.2d 896 (Pa. 1995), the court held, as it did here, that even though the police had probable cause to search the vehicle in question, their warrantless searches were improper under the Fourth Amendment because the Commonwealth did not demonstrate specific exigent circumstances, beyond inherent mobility, that would justify the failure of the police to obtain a warrant before searching the vehicle. That burden of proof is not part of the Fourth Amendment's "automobile exception" equation.

Because the Pennsylvania Supreme Court has so fundamentally misinterpreted the "automobile exception" and grafted onto it requirements that have been soundly rejected by this Court, its incorrect decision below should be reviewed and reversed.

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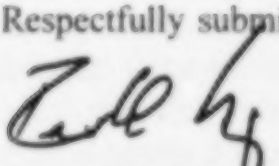
[5](...continued)
The state court also referred to Commonwealth v. Labron, one of the two other cases in the "automobile exception" trilogy. Labron, too, rested on a Fourth Amendment analysis.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 39 M.D. Appeal Docket 1995
	:	Appeal from the Order of the Superior Court at No. 286 Harrisburg 1993, entered November 23, 1994, affirming the Order of the Court of
v.	:	Common Pleas of York County, Criminal Division, at No. 2801 CA 1991, entered March 1, 1993.
	:	437 Pa. Super. 491, 650 A.2d 462 (1994)
RANDY LEE KILGORE, Appellant	:	SUBMITTED: AUGUST 2, 1995

OPINION

DECIDED:
DECEMBER 26, 1995

NIX, C.J.

On July 15, 1992, Appellant, Randy Lee Kilgore ("Appellant"), was convicted by a jury of possession of a controlled substance with intent to deliver and delivery

of a controlled substance.[1] Appellant filed post-trial motions alleging, inter alia, that the court erred in failing to suppress evidence of cocaine found in his vehicle during a warrantless, nonconsensual search. The trial court denied Appellant's post-trial motions. On appeal, the Superior Court affirmed the judgment of sentence. We granted allowance of appeal to review the propriety of the warrantless search of Appellant's vehicle. For the reasons that follow, we reverse.

Appellant's arrest resulted from an undercover operation in which police utilized an informant, Scott Winter ("Winter"), to act as an intermediary in a drug transaction. At or about 7:00 p.m. on July 6, 1991, Winter and Appellant's former wife, Kelly Jo Kilgore ("Kilgore"), met in the parking lot of the Brogue General Store in Chanceford Township, York County. There, Winter informed Kilgore that he had a buyer at a nearby location who was interested in purchasing an ounce of cocaine. Winter indicated that if the buyer were satisfied with the quality of this cocaine, Winter would purchase an additional three and one-half ounces on his behalf. Winter then gave Kilgore $1,300 from funds supplied by police, and Kilgore got back in her car and drove away in order to get the ounce of cocaine.

Kilgore drove to the farm residence of her father where she met with Appellant. A surveillance officer who had been following in an unmarked car observed Kilgore and Appellant walk toward a pickup truck that was parked in the driveway. The officer lost sight of the two suspects as he drove past the residence in order to turn his vehicle around without being seen. When he returned, he saw Appellant and Kilgore walking away

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[1] 35 Pa.C.S. § 780-113(a)(30).

from the truck. Kilgore then got into her car and returned to the parking lot of the Brogue General Store where she gave Winter approximately one ounce of cocaine. Immediately after the transaction, police moved in and arrested Kilgore. A search of her person uncovered a small quantity of cocaine and related paraphernalia; however, Kilgore did not have the $1,300 nor did she have the additional three and one-half ounces of cocaine.

When police arrived at the residence of Kilgore's father, one of the troopers went to the back door. Upon seeing someone run from the kitchen, the trooper announced the presence of the police and entered. He found Appellant in the living room and placed him in custody. The premises were then searched with the consent of Kilgore's father; however, police failed to recover the additional cocaine or the $1,300 paid to Kilgore.

The search then turned to Appellant's truck which was parked at the rear of the residence. Without a warrant or Appellant's consent, police entered the vehicle and found a McDonald's beverage cup on the floor of the passenger's side. Inside the cup were napkins and wrappers which covered several small bags containing approximately three and one-half ounces of cocaine. As a result of this discovery, Appellant was placed under arrest. He later told police that he had hid the missing money under the living room carpet. A subsequent search of that location uncovered $2,100, which included the $1,300 in prerecorded bills that Winter had given to Kilgore.

Prior to trial, Appellant sought to suppress the cocaine that was discovered in his truck. The suppression court denied the motion holding that

> the police had probable cause to believe, based on the interaction between [Kilgore] and [Appellant] as witnessed by the surveillance officer, that [Appellant] was involved with the drug transaction. The officers had probable cause to believe that [Appellant] was transporting drugs for Kelly Kilgore for the purpose of the sale, which occurred at the Brogue store.

Commonwealth v. Kilgore, No.2081 C.A.1991, slip op. at 4-5 (C.P. York County Mar. 1, 1993).

On appeal, the Superior Court affirmed the lower court's denial of the suppression motion. Commonwealth v. Kilgore, 437 Pa. Super. 491, 650 A.2d 462 (1994). Like the suppression court, the Superior Court reasoned that police had probable cause to believe that cocaine was present in Appellant's vehicle based on the observations of the surveillance officer who saw Appellant and Kilgore walking to and from Appellant's vehicle without having entered the residence. Id. at 497-98, 650 A.2d at 465. Thus, the court believed that when the search of the residence failed to uncover the missing money and cocaine, the police had probable cause to believe that those items were in Appellant's vehicle. Id. Although we agree that the facts as presented to the suppression court would lead one to intuitively deduce that the cocaine and money were present in Appellant's vehicle, we are unpersuaded that a warrantless search of the vehicle was justified under the circumstances of this case.

> It is well established that our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are

> supported by the record and whether the legal conclusions drawn from those facts are correct.

Commonwealth v. Morris, 537 Pa. 417, 420, 644 A.2d 721, 723, petition denied, ___ U.S. ___, 130 L. Ed. 2d 519 (1994) (citation omitted). A review of the record in the instant matter fails to disclose any of the recognized exceptions to the search warrant requirement that would justify the search of Appellant's truck.

In Commonwealth v. Cockfield, 431 Pa. 639, 246 A.2d 381 (1968), this Court addressed the legality of a warrantless search of an automobile conducted under circumstances quite similar to those presented in the instant case. In holding that the search of the defendant's vehicle was unreasonable under the Fourth Amendment, we stated:

> Certainly a search without a warrant is not reasonable simply because the officers have probable cause to believe that incriminating evidence will be disclosed. If this constituted "exigent circumstances," it would be almost impossible to think of a case in which a warrant would be necessary. And certainly an automobile is not per se unprotected by the warrant procedure of the Fourth Amendment. Although it sometimes may be reasonable to search a movable vehicle without a warrant, the movability of the area to be searched is not alone a sufficiently "exigent circumstance" to justify a warrantless search. Other circumstances, for instance a serious possibility that the movable vehicle

> may, in fact, be moved before a warrant can be obtained, are necessary.

Id. at 644, 246 A.2d at 384 (citations omitted). Thus, because the defendant was in police custody at the time of the search and because there was no legitimate reason to believe that the car would be moved, we held that the failure of the police to obtain a search warrant necessitated the exclusion of the evidence derived from that search. Id. at 644-45, 246 A.2d at 384.

Likewise, in Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62, cert. dismissed, 409 U.S. 1031, 34 L. Ed. 2d 482 (1972), this Court also found that a warrantless search of a vehicle was unreasonable where no exigent circumstances were present. In Linde, the defendant shot his estranged lover five times and then turned the gun on himself. The victim died instantly, and the defendant was transported by ambulance to a nearby hospital. A police officer went to the hospital to obtain the keys to the defendant's vehicle which was parked at a service station near the scene of the murder. A subsequent search of the vehicle uncovered a notebook of highly incriminating writings authored by the defendant. The writings were introduced against the defendant at trial.

In analyzing the reasonableness of the warrantless search of the defendant's vehicle, this Court again set forth the analysis necessary to justify such a search.

> [A] dual inquiry, both parts requiring affirmative answers must be made: first, whether there existed probable cause to search; and secondly, whether exigent circumstances can be found to excuse the obtaining of a warrant.

Id. at 233, 293 A.2d at 63-64. These principles were recently reaffirmed by this Court in Commonwealth v. Labron, ___ Pa. ___, ___ A.2d ___ (1995), wherein we held that

> this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search. Furthermore, we have consistently recognized that when police have advance information that a particular vehicle carrying evidence of a crime would be situated at a particular locale, such that sufficient time exists to obtain a warrant, the failure of the police to secure a warrant prior to searching the vehicle will render the search unreasonable.

Id. at ___, ___ A.2d at ___ (emphasis added).

In the instant case, there is ample evidence in the record to support the suppression court's finding that police had probable cause to believe that the cocaine and money were in Appellant's vehicle; however, we are unable to ascertain the presence of any exigent circumstances which would justify the failure of police to obtain a search warrant prior to searching the vehicle.

The record discloses that at least three of the officers involved in the undercover investigation were at the residence of Appellant's father-in-law at the time of the search of Appellant's vehicle. The police had Appellant in custody while they conducted a consensual search of the residence. Appellant's vehicle was parked outside at the rear of the residence. Clearly, one of the

officers could have secured the vehicle while a search warrant was obtained. The Commonwealth has failed to meet its burden of establishing that exigent circumstances existed such that it would have been impracticable for police to have obtained a search warrant under the circumstances presented herein. See Pa.R.Crim.P 323(h) ("The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights."). Accordingly, we are constrained to conclude that the search of Appellant's vehicle was conducted in a manner which violated his rights under the Fourth Amendment, and thus, the fruits of that warrantless search should have been suppressed.

Order reversed.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Montemuro, who participates by designation as a senior judge as provided by Rule of Judicial Administration 701 (f), concurs in the result.

JUDGMENT ENTERED:
JANUARY 24, 1996

/s/
JOAN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee,	:	No. 39 M.D. Appeal Docket 1995
	:	Appeal from the order of the Superior Court at No. 286 HBG 93, entered November 23, 1994, affirming the Order of the Court of
v.	:	Common Pleas of York County, Criminal Division, at No. 2801 CA 1991, entered March 1, 1983.
	:	437 Pa. Super. 491, 650 A.2d 462 (1994)
RANDY LEE KILGORE, Appellant.	:	SUBMITTED: August 2, 1995

DISSENTING OPINION

DECIDED:
DECEMBER 26, 1995

MR. JUSTICE CASTILLE

The majority holds that although probable cause existed to search appellant's car, the cocaine and money found in appellant's car must be suppressed because appellant was in custody and police could have guarded the car until they were able to secure a warrant to search it. I believe that such a ruling ignores the circumstances

of the search as well as the impact that such a ruling makes upon the limited resources of police. Accordingly, because I believe the majority's holding all but eviscerates the automobile exception to search warrant requirements, I must dissent.

It is well established that a warrantless search of an automobile does not offend the Fourth Amendment where, *inter alia*, there is probable cause to search the vehicle and where exigent circumstances exist. Commonwealth v. Milyak, 508 Pa. 2, 7-8, 493 A.2d 1346, 1349 (1985) (citations omitted); Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978) (the realities and practicalities of law enforcement dictate that where exigent circumstances exist, the warrant requirement is excused) (citation omitted); Commonwealth v. Lewis, 442 Pa. 98, 100, 275 A.2d 51, 52 (1971) (warrantless search is proper where probable cause exists to believe evidence of a crime is concealed in the vehicle). This "automobile exception" to the warrant requirement was recognized as a result of the reduced expectation of privacy a person has with respect to his or her automobile, the exigency created by the mobility of a car, and that due to the exigency it would be unlikely that the vehicle would be available by the time police were able to obtain a warrant. Commonwealth v. Smith, 452 Pa. 1, 5, 304 A.2d 456, 458 (1973), *cert. denied*, 414 U.S. 1076 (1973), *citing* Chambers v. Maroney, 399 U.S. 42, 51 (1973). In finding that the automobile exception does not apply to the search at issue, the majority has essentially eviscerated the entire automobile exception since it now holds that if a police officer can be made available to guard the car while another officer obtains a warrant, then there is no exigency because it is no longer unlikely that the police guarded vehicle will be unavailable by the time a warrant was obtained.

Ignoring the time it may take for police to: return to their headquarters, type up an affidavit, obtain approval of the affidavit from the local District Attorney's office (if required), locate a neutral and detached magistrate to approve the warrant, have the warrant approved (assuming no changes are needed), and possibly round-up additional back-up, the majority has now imposed a duty upon police to idly watch over a car until a warrant is obtained, whenever that time might be. One of the purposes behind the automobile exception was to prevent this type of drain on law enforcement. *See* United States v. Chadwick, 433 U.S. 1 (1977), *accord* Commonwealth v. Timko, 491 Pa. 32, 38, 417 A.2d 620, 623 (1980) (the basis for allowing warrantless searches of automobiles is based upon the inherent mobility of vehicles, the consequent practical problems of obtaining a warrant prior to infringing a legitimate expectation of privacy, and the diminished expectation of privacy which is accorded automobiles because of their open construction, their function, and their subjection to a myriad of state regulations).

Moreover, policy considerations also support the police officers' immediate warrantless search of the vehicle as opposed to requiring some officers to remain at the scene, securing the vehicle, while other officers seek out a search warrant. Requiring a number of police officers to remain with a suspect *and* a vehicle for an indefinite and uncertain amount of time will exhaust the limited resources of law enforcement and further ignores the realities attendant to the demands placed on law enforcement in modern society. Under such circumstances, the officers who secure the vehicle will not be available to respond to any other police emergencies. Many automobile investigations occur after regular hours and where, as here, the incident occurs in a rural area, procurement of a search warrant could take hours

depending on the distance from the nearest magistrate and the location of the impoundment of the vehicle.

As stated by this Court in Commonwealth v. Milyak, 508 Pa. at 9-10, 493 A.2d at 1349, immobilization of a vehicle until a search warrant is obtained is merely an alternative to an immediate warrantless search of a vehicle, not a requirement as the majority holds. *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970) (there is no difference between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant; thus, given probable cause to search, either course is reasonable under the Fourth Amendment); Commonwealth v. Baker, 518 Pa. 145, 149, 541 A.2d 1381, 1383 (1988), *overruled in part by* Commonwealth v. Rosario, __ Pa. ___, 648 A.2d 1172 (1994). Thus, as a matter of federal and state case law, the police officers here were not required to secure or immobilize the vehicle until a search warrant was obtained.

Both Commonwealth v. Cockfield, 431 Pa. 639, 246 A.2d 381 (1968) and Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972), *cert. dismissed*, 409 U.S. 1031 (1972), upon which the majority rely, are readily distinguishable from the instant case. In Cockfield, police officers were patrolling a neighborhood on April 7, 1960, at approximately 2:30 a.m., when they discovered a house fire. When firemen gained entry into the home, the dead bodies of a woman and her two young children were found. Police and fire officials detected a strong odor of gasoline or kerosene on the premises.

At approximately 3:40 a.m., two detectives who were investigating the fire spoke with a neighbor of the victims. The neighbor informed them that the deceased woman had a relationship with a man who was later

determined to be Cockfield. The woman said that the couple's relationship had been strained and that Cockfield assaulted the woman with a knife approximately one month prior to the fire. The neighbor also informed the police that Cockfield drove a 1953 or 1954 Dodge or Plymouth car with a bluish top and dirty white or gray at the bottom. Shortly after 5 a.m., the detectives and two other officials went to the neighborhood where Cockfield was believed to live. A neighborhood resident directed the officials to Cockfield's house. The officers rang Cockfield's doorbell and knocked on the door but no one responded.

The officers then walked through the general area to see if there was an automobile which matched the description given to them. A car fitting the description was parked approximately three-fourths of a block away. The officers felt the hood of the car and it was quite warm indicating that the motor had recently been operating. One of officers took the license plate number to ascertain the identity of the registered owner. However, within minutes, the officer returned to the location of the vehicle with the deceased woman's sister who told the police that the vehicle belonged to Cockfield. The police then opened the trunk of the car, which smelled of gasoline, and discovered a two gallon empty can marked "Gulf" and a roll of charred toilet paper. The officers maintained surveillance of the automobile until approximately 8 a.m., however, Cockfield never appeared. Consequently, the police towed the automobile to a nearby police station where it was parked and disabled by removing the distributor and disconnecting certain electrical wiring. Later that day, Cockfield discovered his automobile parked in front of the police station. Cockfield went inside the station and inquired as to why his vehicle was at the station. A duty officer told Cockfield that he could take the car. Thus, Cock-

field purchased and installed the necessary parts and drove the car away.

On April 8, 1960, at approximately 1 a.m., police took Cockfield into custody and questioned him regarding the fire. On April 9, 1960, Cockfield signed an inculpatory statement. Thereafter, police took Cockfield's automobile into custody a second time. After Cockfield was arraigned, police officers unlocked the trunk of the automobile and seized the gasoline can and charred toilet paper which the Commonwealth introduced as evidence at Cockfield's trial.

This Court concluded that the evidence seized from Cockfield's vehicle must be suppressed because the warrantless search of the vehicle was unreasonable under the Fourth Amendment. This Court reasoned that since Cockfield was in police custody at the time of the search, there was no legitimate reason to believe that the car would be or could be moved. Consequently, this Court held that there were no exigent circumstances which justified the warrantless search. Id. at 645, 246 A.2d at 384.

In Linde, police arrived at the defendant's girlfriend home and discovered that both Linde and his girlfriend had been shot. The girlfriend died instantly as a result of five gunshot wounds, however Linde survived and was transferred to a hospital. The police located Linde's automobile which was parked at a service station approximately 550 yards from his girlfriend's home. One police officer went to the hospital and obtained Linde's car keys from a hospital custodian. The officer returned to the service station where officers unlocked and searched the car. The officers found a notebook containing five pages of handwritten incriminating statements. Ten days later, the police went to the hospital

and presented the incriminating notes to Linde. After acknowledging that he owned the notebook and that he wrote the notes, Linde initialed each page. The Commonwealth introduced the writings as evidence against Linde at trial.

This Court held that the writings seized from Linde's vehicle must be suppressed because even assuming that the police had probable cause to search the vehicle, the exigent circumstances required for a warrantless search were clearly absent because the vehicle was under constant police guard from the moment it was located to the moment the police searched it; the vehicle was locked, unoccupied, and the police had possession of the keys; and because Linde himself was in the hospital undergoing emergency surgery and therefore, there was no danger he would move the car.

Clearly, Cockfield and Linde both involved searches of vehicles which had been in police custody and which police had immobilized for several hours prior to conducting a search. Consequently, in those cases, unlike the instant case, the police had ample opportunity to procure a search warrant. Here, police conducted the search at issue only after the police had reason to believe that appellant was in possession of additional cocaine and the prerecorded money. The car was located on a third party's property and was within reach of appellant's father who was present. Under these circumstances, I would find that exigent circumstances existed. Commonwealth v. Milyak, supra at 7-8, 493 A.2d at 1349; Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991) (probable cause and exigent circumstances existed where reliable confidential informant supplied police with information regarding appellant's illegal activities, where informant told police

that appellant would be at a certain location, on a certain date and that appellant would be selling drugs; moreover, since police did not know appellant would be travelling in that specific vehicle on the date in question until they saw appellant driving, the warrantless search of defendant's vehicle was valid); Commonwealth v. Baker, supra (warrantless search of vehicle proper where police received information from a reliable informant that defendant assaulted an individual in an alley with a gun and that the defendant exited the scene in a particular automobile and within minutes of the informant's information, police located that automobile and placed defendant under a brief period of surveillance and stopped defendant only when he attempted to drive away).

Accordingly, I would affirm the order of the Superior Court.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYL-VANIA
v.	:	
RANDY LEE KILGORE, Appellant	:	No. 286 Harrisburg, 1992

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of York County, No. 2081 C.A. 1991.

BEFORE: WIEAND, SAYLOR and CERCONE, JJ.

FILED Nov 23 1994

OPINION BY WIEAND, J.:

Randy Lee Kilgore was tried by jury and was found guilty of delivery of cocaine and possession of cocaine with intent to deliver. Post-trial motions were denied, and Kilgore was sentenced to serve concurrent terms of imprisonment for not less than four years nor more than eight years. On direct appeal from the judgment of sentence, Kilgore challenges trial and pre-trial rulings made by the trial court.

With the aid of Scott Winter, a suspect in another criminal matter, arrangements were made by state police to purchase from Kelly Jo Kilgore, the former wife of the defendant, Randy Lee Kilgore, an "eighth kilo" (approximately four and one-half ounces) of cocaine in the parking lot of the Brogue General Store in Chanceford Township, York County, on July 6, 1991. At or about 7:00 p.m. on that date, Winter and

Kelly met in the parking lot, where Winter informed Kelly that he had a buyer waiting "up the road" and wanted an ounce of cocaine. The "buyer" wanted to examine this cocaine, he said and, if he were satisfied, Winter would buy an additional three and one-half ounces on his behalf. Winter then paid Kelly the sum of $1,300.00 from funds which had been supplied by the police, and Kelly got back in her car and drove away to get the cocaine.

While under surveillance by police in an unmarked car, Kelly drove to the home of her father, approximately a mile away. There, she exited her car and met her husband, Randy Kilgore. Both were observed as they walked toward a pickup truck which had been parked in the driveway. The surveilling policeman then lost sight of the Kilgores as he passed the home and turned his vehicle around out of sight of the home. When he returned, he saw the Kilgores walking away from the truck. Kelly then got into her car and returned to the Brogue General Store, where she delivered approximately an ounce of cocaine to Winter. He signalled the waiting police, who then moved in and placed Kelly under arrest. A search of her person produced a small quantity of cocaine and drug paraphernalia, but she did not have the $1,300.00 dollars which Winter had paid to her or the additional cocaine which Winter had expressed a desire to purchase.

Police then went to the home of Kelly's father, Otis Brown, where Trooper Kurt Voggenreiter went to the back door. The back door was open, and through a screen door he could see the interior of the kitchen. When he saw someone run from the kitchen, he announced the presence of police and entered. He found Randy Kilgore in the living room and placed him in the custody of other police personnel who had entered the

kitchen. With the consent of Otis Brown, the owner, the premises were then searched, but neither cocaine nor the money paid to Kelly Kilgore during the prior cocaine transaction was discovered.

Without a warrant or consent of the owner, other police conducted a search of Randy Kilgore's truck, which was parked at the rear of the residence. They found several small bags of cocaine in a beverage cup on the front floor of the truck. The cocaine was later determined to weigh approximately three and one-half ounces. Randy Kilgore was then arrested and placed in the back of a police vehicle. He later told police that the money they were seeking was under the living room carpet. There they found $2,100.00, which included $1,300.00 in pre-recorded bills which had been paid to Kelly Kilgore.

The trial court refused to suppress the cocaine found in Randy Kilgore's truck, and this, it is argued on appeal, was error. Our standard of review of this issue was stated in Commonwealth v. Govens, 429 Pa.Super. 464, 632 A.2d 1316 (1993), as follows:

> In conducting appellate review of the ruling of the suppression court, this Court:
>
> > 'must determine whether the factual findings are supported by the record. When it is a defendant who has appealed, we must consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record

> as a whole, remains uncontradicted. Assuming that there is support in the record, we are bound by the facts as are found and we may reverse the suppression court only if the legal conclusions drawn from those facts are in error.'
>
> Commonwealth v. Whitney, 511 Pa. 232, 239-240, 512 A.2d 1152, 1156 (1986), quoting Commonwealth v. Cortez, 507 Pa. 529, 532, 491 A.2d 111, 112 (1985), cert. denied, 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985). See also: Commonwealth v. O'Shea, 523 Pa. 384, 395, 567 A.2d 1023, 1028 (1989), cert. denied, ___ U.S. ___, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990); Commonwealth v. Hughes, 521 Pa. 423, 438-439, 555 A.2d 1264, 1271-1272 (1989).

Id. at 473, 632 A.2d at 1320.

With respect to searches of motor vehicles, the Pennsylvania Supreme Court has said, in Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985), the following:

> While searches and seizures conducted outside the judicial process, without prior approval by a magistrate, are generally unreasonable under the Fourth Amendment, Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d

576, 585 (1967); Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978), there is an established departure from the warrant requirement for certain automobile searches based on the inherent mobility of vehicles, with the consequent practical problems in obtaining a warrant prior to infringing a legitimate expectation of privacy, and on the "diminished expectation of privacy which is accorded automobiles because of their open construction, their function, and their subjection to a myriad of state regulations." Commonwealth v. Timko, 491 Pa. 32, 38, 417 A.2d 620, 623 (1980) citing United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); see also, South Dakota v. Opperman, 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1979). Accordingly, as stated by this Court in Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971):

> To justify ... a [warrantless] search ..., an officer must have independent probable cause to believe that a felony has been committed by the occupants of the vehicle, or that it has been used in the furtherance of the commission of a felony, or the officer must have a basis for believing that

> evidence of a crime is concealed within the vehicle, or that there are weapons therein which are accessible to the occupants.
>
> Id. at 101, 275 A.2d at 52; see also, Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972) citing Chambers v. Maroney, supra; Commonwealth v. Smith, 443 Pa. 151, 277 A.2d 807 (1971); Commonwealth v. Dussell, 439 Pa. 392, 266 A.2d 659 (1970) citing Dyke v. Taylor Implement Manufacturing Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968). Thus, where there exists probable cause related to the vehicle or its occupants, a search of the vehicle is permissible.

Id. at 7-8, 493 A.2d at 1349. See also: United States v. McGlory, 968 F.2d 309, 343 (3d Cir.1992); United States v. Salmon, 944 F.2d 1106, 1123 (3d Cir.1991), cert. denied, Washington v. United States, ___ U.S. ___, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992); Commonwealth v. Germann, 423 Pa.Super. 393, 398-399, 621 A.2d 589, 592 (1993).

"The level of probable cause necessary for a warrantless search of an automobile is the same as that needed to obtain a [search] warrant." Commonwealth v. Talley, 430 Pa.Super. 351, 357, 634 A.2d 640, 643 (1993); Commonwealth v. Pleummer, 421 Pa.Super. 51, 56, 617 A.2d 718, 721 (1993), allocatur denied, ___ Pa. ___, 637 A.2d 282 (1993). In Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991), the Pennsylvania Supreme Court explained:

> In this Commonwealth, the standard for evaluating whether probable cause exists is the "totality of the circumstances" test set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). See Commonwealth v. Baker, 513 Pa. 23, 518 A.2d 802 (1986), Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985). The bench mark of a warrantless arrest is the existence of probable cause, namely, whether the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. Commonwealth v. Wagner, 486 Pa. 548, 406 A.2d 1026 (1979). Applying that test to the within case, the veracity and basis of knowledge of those persons supplying hearsay information must be examined to determine whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place." Commonwealth v. Baker, supra, 513 Pa. at 26, 518 A.2d at 803.

Id. at 272-273, 585 A.2d at 990.

> Once the requirement of probable cause is satisfied, the exigencies regarding the inherent mobility of a vehicle and inadequate time to obtain a search warrant render a warrantless vehicle search proper

> even when the accused is in police custody.

Commonwealth v. Elliot, 416 Pa.Super. 499, 504, 611 A.2d 727, 729 (1992), allocatur denied, 534 Pa. 646, 627 A.2d 177 (1993). After probable cause exists, the police are not required to watch over or immobilize a vehicle while a search warrant is obtained. See: Commonwealth v. Baker, 518 Pa. 145, 149, 541 A.2d 1381, 1383-184 (1988); Commonwealth v. Camacho, 425 Pa.Super. 567, 578-580, 625 A.2d 1242, 1248-1249 (1993).

The suppression court found that police had probable cause to search appellant's truck. The evidence showed that Kelly Kilgore had left the parking lot of the Brogue General Store to obtain cocaine and had been followed. She entered her car and drove directly to her father's home where, without entering the home, she met her husband. The two of them then walked toward the truck. The following police car passed the home and for a few minutes was out of sight of the truck. After the police car was turned around and returned, however, Kelly and Randy Kilgore were observed walking back from the truck. Kelly then got into her car and drove directly to the parking lot of the store, where she delivered an ounce of cocaine to Scott Winter. Subsequently, when police searched the Brown home, they did not find any cocaine, even though Kelly had assured Scott Winter that she had an additional three and one-half ounces of cocaine to sell.

Under these circumstances, we find no error in the trial court's finding that the police had probable cause for believing that cocaine was present in the truck. See and compare: Commonwealth v. Elliot, supra; Commonwealth v. Jenkins, 401 Pa.Super. 580, 585 A.2d

1078 (1991), allocatur denied, 528 Pa. 621, 597 A.2d 1151 (1991). Moreover, once police had probable cause to search the vehicle, a search of closed containers in that vehicle was also permissible. See: California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); Commonwealth v. Elliot, supra; Commonwealth v. Hoffman, 403 Pa.Super. 530, 589 A.2d 737 (1991), allocatur denied, 530 Pa. 652, 608 A.2d 28 (1992).

During direct examination, the Commonwealth showed that its witness, Scott Winter, had previously been convicted of forgery, of several burglaries and of several thefts. Appellant also sought to show that Winter had been convicted of arson, but the prosecution asserted and the trial court found that Winter's arson conviction was not crimen falsi.[1] Therefore, the trial court excluded evidence that the witness had been convicted of arson. Appellant argues in this Court, as he did in the trial court, that because arson is a felony, a conviction thereof is admissible to attack the credibility of a witness.

In Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987), the Supreme Court adopted the following rule:

> [E]vidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of

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[1]The record forwarded to this Court does not permit us to make a determination of the circumstances which led to Winter's conviction for arson.

> conviction or the last day of confinement is within ten years of the trial date. If a period greater than ten years has expired the presiding judge must determine whether the value of the evidence substantially outweighs its prejudicial effect.

Id. at 415, 528 A.2d at 1329. See: Commonwealth v. Jackson, 526 Pa. 294, 585 A.2d 1001 (1991); Commonwealth v. Walker, 384 Pa.Super. 562, 559 A.2d 579 (1989); Commonwealth v. Flis, 369 Pa.Super. 275, 535 A.2d 157 (1987), allocatur denied, 519 Pa. 659, 546 A.2d 620 (1988). See also: Packel and Poulin, Pennsylvania Evidence, Ch. VI, § 609 (1987). Thus, it is now established that a witness may be impeached on the basis of a prior conviction only if the crime involves dishonesty or false statement. Commonwealth v. Mehalic, 382 Pa.Super. 264, 285, 555 A.2d 173, 183 (1989). "[A] witness may not be impeached on the basis of convictions for crimes not involving dishonesty or false statement." Commonwealth v. Williams, 524 Pa. 404, 407, 573 A.2d 536, 538 (1990). See also: Commonwealth v. Penn, 497 Pa. 232, 244, 439 A.2d 1154, 1160 (1982), cert. denied, 456 U.S. 980, 102 S.Ct. 2251, 72 L.Ed.2d 857 (1982); Commonwealth v. Corley, 432 Pa.Super. 371, 379, 638 A.2d 985, 989 (1994). Indeed, the Supreme Court has said that

> the law regarding impeachment of a witness and impeachment of a defendant is consistent in prohibiting impeachment regarding prior arrests and prior convictions for crimes not involving crimen falsi.

Commonwealth v. Stokes, 532 Pa. 242, 256, 615 A.2d 704, 711 (1992).

It follows that appellant's argument must fail. Even a felony conviction is admissible to impeach the credibility of a witness only if the crime involved dishonesty or false statement. Because the record does not enable us to determine whether the witness's arson conviction was based on a reckless act or a dishonest act,[2] we cannot say that the trial court erred when it excluded evidence thereof to impeach the witness's credibility.

Appellant's argument that the prosecution failed to establish a chain of custody sufficient to permit the cocaine to be received in evidence must also be rejected. "Physical evidence may be admitted at trial without demonstrating to an absolute certainty the precise chain of custody." Commonwealth v. Culmer, 413 Pa.Super. 203, 217, 604 A.2d 1090, 1097 (1992).

> Real evidence is sufficiently authenticated if 'evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court.'

Commonwealth v. Schwartz, 419 Pa.Super. 251, 269, 615 A.2d 350, 359 (1992), allocatur denied, 535 Pa. 617, 629 A.2d 1379 (1993), quoting Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980).

In the instant case, there was no evidence suggesting a break in the chain of custody of the cocaine seized from appellant's truck. Moreover and in any event, "gaps in the chain of custody go to the weight to

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[2]See: 18 Pa.C.S. § 3301.

be given to the testimony, not its admissibility." Commonwealth v. Bolden, 486 Pa. 383, 388-389, 406 A.2d 333, 335-336 (1979). Here, the jury could find that the cocaine received at trial was the contraband removed from appellant's truck. The trial court did not err when it allowed this evidence to be admitted.

Finally, appellant contends that the trial court erred when it permitted Kimberly Souder to testify as an expert in analyzing and identifying the alleged contraband as cocaine. In Commonwealth v. McCloy, 393 Pa.Super. 217, 574 A.2d 86 (1990), allocatur denied, 527 Pa. 585, 588 A.2d 508 (1991), the Superior Court reviewed the applicable law as follows:

> To qualify as an expert witness, a witness need only have a "reasonable pretension to specialized knowledge," on a subject for which expert testimony is admissible. Commonwealth v. Washington, 235 Pa. Super. 339, 340 A.2d 896 (1975). An expert's pretension to specialized knowledge may be based upon practical, occupational, or other experiential training; the expert need not have gained expertise through academic training. Commonwealth v. Ellis, 354 Pa.Super. 11, 510 A.2d 1253 (1986); Commonwealth v. Daniels, 280 Pa.Super. 278, 421 A.2d 721 (1980). The determination of whether a witness is qualified to offer an expert opinion on a particular subject is a matter addressed to the sound discretion of the trial court, and its discretion will not be reversed absent a clear abuse of discretion. Commonwealth v. Samuels, 354 Pa. Super. 128, 511 A.2d 221 (1986);

> Commonwealth v. Ellis, supra; Commonwealth v. Bulling, 331 Pa.Super. 84, 480 A.2d 254 (1984).

Id. at 220-221, 574 A.2d at 88, quoting Commonwealth v. Pearsall, 368 Pa.Super. 327, 332, 534 A.2d 106, 109 (1987), allocatur denied, 524 Pa. 596, 568 A.2d 1246 (1989). See also: Commonwealth v. Snowdy, 412 Pa.Super. 493, 502-503, 603 A.2d 1044, 1048 (1992), allocatur denied, 533 Pa. 633, 621 A.2d 580 (1993).

In the instant case, Souder testified that she had been graduated from Pennsylvania State University with a B.S. in chemistry. Thereafter, she had undergone five weeks of on-the-job training before she began working for the Pennsylvania State Police. During this time period, she had performed between fifty and one hundred chemical analyses while under the direct supervision of another chemist. At the time of trial, Souder had been employed by the State Police for approximately six months, during which time she had performed approximately nine hundred additional chemical analyses. Although she was still on probationary status, all of her work performance reviews had been satisfactory. She had previously qualified to testify as an expert witness in both York and Dauphin Counties. Although it is true that Souder did not possess a vast wealth of forensic experience, it was sufficiently established that she possessed a reasonable pretension to specific knowledge with regard to chemical testing of suspected illicit drugs. We conclude, therefore, that the trial court did not commit an abuse of discretion when it determined that Souder was qualified to give expert testimony. See: Commonwealth v. Echevarria, 394 Pa.Super. 261, 266-267, 575 A.2d 620, 623 (1990).

Finding no error in appellant's trial, the judgment of sentence must be affirmed.

Affirmed.

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 2081 C.A. 1991
	:	
v.	:	Delivery of Drugs;
	:	Possession with Intent
RANDY LEE KILGORE	:	to Deliver; Conspiracy

APPEARANCES:

CHRISTY FAWCETT, ESQUIRE
Assistant District Attorney
for the Commonwealth

ALLEN H. SMITH, ESQUIRE
for Defendant

OPINION

This matter comes before the Court on the post-trial motions of defendant, Randy Lee Kilgore, seeking an arrest of judgment and in the alternative a new trial. Defendant was convicted by jury trial of possession of drugs with intent to deliver, and delivery of drugs on July 15, 1992. Co-defendant, Kelly Kilgore, was convicted in the same trial of possession of drugs, possession of drugs with intent to deliver and delivery of drugs. For the following reasons, defendant, Randy Lee Kilgore's post-trial motions will be refused and denied.

Defendant's allegations of error are as follows:

1. Improper refusal to suppress evidence of cocaine found in defendant's vehicle in

a plastic cup during warrantless, non-consensual search;

2. Failure to dismiss charges based on Pa.Crim.Proc. Rule 1100 violation;

3. Chain of custody broken for drugs during period of July 8, 1991 until May 14, 1992;

4. Error in refusing to allow evidence of prior conviction of non crimen falsi felony (i.e. arson) to impeach a witness other than a defendant;

5. Improper certification as expert witness of forensic chemist who analyzed drugs after original chemist was on leave for illness;

6. Allegation that Commonwealth failed to meet its burden of proof that drugs analyzed by second chemist had not been "altered, mixed, unadulterated" by original chemist, who was unavailable for trial;

7. Failure to grant mistrial when prosecutor referred to defenses of defendant as "smoke screen."

The factual background surrounds the arranged sale and delivery of over 125 grams of cocaine by co-defendant Kelly Kilgore to undercover drug officers. The pre-arranged "buy" occurred at the Brogue Store when Kelly Kilgore received $1,300.00 from the informant in exchange for a sample of approximately 1 ounce of the cocaine. After the money was transferred, Kelly

Kilgore drove to the farm residence of her father where she met with the defendant.

Before returning to the store, where she made the drug transfer, a surveillance officer observed Kelly Kilgore drive down the farm lane, get out of her vehicle, meet defendant and walk toward the defendant's truck which was parked in the driveway. The defendant and co-defendant met and then co-defendant, Kelly Kilgore, returned to her car and drove back to the Brogue store where the transaction occurred. Upon return to the farm, after the transaction and arrest of Kelly Kilgore, defendant Randy Kilgore was inside the residence. Kelly Kilgore's father gave consent for the search of the premise.

Defendant first argues that the Court erred through improper refusal to suppress evidence of cocaine found in defendant's vehicle in a plastic cup during warrantless, non-consensual search. The defendant argues that the momentary liaison between the co-defendant and defendant was not within the defendant's vehicle, only within the vicinity. Defendant alleges a lack of probable cause to search the truck, and a lack of exigent circumstances which would require a warrantless search thereof. The drugs were not in plain view, but rather were hidden in a fast-food beverage cup with a lid on it. Defendant maintains that he was not the subject of the arrest when the search occurred, and accordingly, under the authority of New York v. Belton, 453 U.S. 454 (1981), the fruits of such search must be suppressed.

In its Order of October 1, 1991, this Court determined that there was probable cause to believe that there was a balance of cocaine left in the vicinity of where the delivery was made to Kelly Kilgore.

> While searches and seizures conducted outside the judicial process, without prior approval by a magistrate, are generally unreasonable under the Fourth Amendment, (cites omitted), there is an established departure from the warrant requirement for certain automobile searches based on the mobility of vehicles, with the consequent practical problems in obtaining a warrant prior to infringing a legitimate expectation of privacy, and on the 'diminished expectation of privacy which is accorded automobiles because of their open construction, their function, and their subjection to a myriad of state regulations.' (cites omitted). Accordingly, as stated by this Court in Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971): To justify ... a [warrantless] search ..., an officer must have independent probable cause to believe that a felony has been committed by the occupants of the vehicle, or that it has been used in the furtherance of the commission of a felony, or the officer must have a basis for believing that evidence of a crime is concealed within the vehicle, or that there are weapons therein which are accessible to the occupants. (cites omitted).

Com. v. Milyak, 508 Pa. 2, 7-8, 493 A.2d 1346 (1985).

Under this standard, the police had probable cause to believe, based on the interaction between the co-defendant and defendant as witnessed by the surveillance officer, that the defendant was involved with the

drug transaction. The officers had probable cause to believe that the defendant was transporting drugs for Kelly Kilgore for the purpose of the sale, which occurred at the Brogue store. Accordingly, the police acted within the law when they searched the truck. We determine that under the totality of the circumstances, probable cause existed for the warrantless search of defendant Kilgore's vehicle and deny any allegation of error.

Next, defendant argues that Pennsylvania Rule of Criminal Procedure Rule 1100 requires the dismissal of all charges against defendant. Defendant was arrested and charged with the crimes on July 6, 1991, a preliminary hearing was held on July 22, 1991, and arraignment was completed on August 23, 1991. A suppression motion was filed September 9, 1991 and refused after hearing on October 1, 1991. The Court's time was taken on other matters so that the motion could not be heard until over three weeks after the motion was filed. Under the authority of Com. v. Chilcote, 396 Pa.Super 106, 112-113, 578 A.2d 429 (1990), we determine that the period of delay involved in the motion to suppress and this Court's ruling should be charged against the defendant and is properly excluded from the computation of the 180-day period under Rule 1100. With the exclusion of these days, the commencement of trial was timely.

Because of the determination that the trial was commenced within the mandates required under Rule 1100, we determine that defendant's due diligence argument is moot.

Next, defendant argues that no chain of custody of the drugs was established for the period of July 8, 1991 until May 14, 1992. The record reveals that

Detective Voggenreiter, as evidence officer, received the drugs on July 6, 1991, and secured them in his locked trunk until Monday, July 8, 1991 when he delivered them to the state police crime lab. The drugs remained there until just prior to trial when Trooper Corbett picked them up from the state police crime lab, using the regular procedures for such transfer of evidence. The evidence was then delivered by Trooper Corbett to Trooper George and secured in the District Attorney's Office safe, until the time of trial. The defense objects, not to the transfers of the substances, but rather to the chain of custody at the state police crime lab. The original analysis of the evidence was performed on August 12, 1991, by a chemist who subsequently had a heart attack which required an extended medical leave of absence. The Commonwealth represented to the Court that the first chemist, Prasad Dasgupta, was still unavailable at the time of trial. No testimony was presented regarding the results of the first chemist's analysis. The Court took notice that the illness of Dasgupta was corroborated through other judicial matters.

The subsequent analysis was performed on June 3, 1992, by a chemist who testified that she took the evidence from the evidence vault which is kept secure, and returned it back into the vault at the conclusion of her analysis. The second chemist identified the evidence as cocaine and testified in detail with respect to the analysis procedures and supervision. Defense maintains that Dasgupta was not unavailable at the time of trial to testify to the condition of the drugs at the time of his analysis. Although the original chemist did return to the state laboratory before the end of his medical leave, the record reveals that his visit was of very short duration and social in nature.

Defendant alleges that Detective Voggenreiter obtained the alleged drugs on July 6, 1991, and delivered them to the Harrisburg Crime Laboratory on July 8, 1991. When Detective Voggenreiter next saw the evidence on July 13, 1992, the evidence was packed differently. On July 6, 1991, the contents were in plastic baggies. On July 13, 1992, the contents were in heat sealed plastic bags. Physical evidence may be admitted at trial without demonstrating an absolute chain of custody. Com. v. Culmer, ___ Pa.Super. ___, 604 A.2d 1090, 1097 (1992). Gaps in the chain of custody go to the weight to be given the testimony, not to its admissibility. Com. v. Bolden, 486 Pa. 383, 389, 406 A.2d 333 (1979).

The Commonwealth must establish a reasonable inference that the identity and condition of the evidence has remained the same from the time it was first received until the time of trial. Com. v. Miller, 234 Pa.Super. 146, 339 A.2d 573 (1975). The chain of custody of the drugs as testified to by the second chemist was that she followed the procedure at the Pennsylvania State Crime Lab which was to remove the evidence from the secure vault for the purposes of the analysis, and to return it to the secure vault at the completion of her analysis.

Additionally, much attention was given to the chain of custody in defense counsel's closing arguments, stressing that the jury be absolutely convinced about the qualifications of the chemist and the condition of the drugs in order to convict the defendants. Given the totality of the testimony, argument and evidence, we determine that the jury could reasonably conclude that the condition of the evidence remained the same from the time it was first received until the time of trial.

Next, the defense maintains that the Court erred when it ruled that Scott Winters, a witness for the Commonwealth, could not be impeached for felonies of which he was convicted and sentenced unless the felonies were of a crimen falsi nature. In this case, Scott Winters assisted the Commonwealth in setting up the drug raid by arranging a buy from Kelly Kilgore. Under cross-examination, an effort was made to elicit Winters' prior conviction for felonies not of a crimen falsi nature, specifically arson, disorderly conduct and underage drinking. The Court determined that the prior offenses were not relevant to the witness's veracity and accordingly, were inadmissible. See, Com. v. Yost, 478 Pa. 327, 386 A.2d 956 (1978).

Defense argues that a distinction is made between the admissibility of prior records of defendants and witnesses for impeachment purposes. Defense agrees that prior convictions for felonies not involving crimen falsi crimes may not be used to impeach a defendant; but defense maintains that prior convictions for felonies not involving crimen falsi crimes may be used to impeach one other than a defendant. Defense contends that Com. v. Eubanks, 511 Pa. 201, 512 A.2d 619 (1986) clearly draws a distinction between the rule for defendants and the rule for witnesses. The Court in Eubanks, supra., determined that the exclusion of evidence of a prior homicide conviction by the witness, which reference to was critical to the defendant's defense, was reversible error.

We find no probative value to the revelations concerning arson, disorderly conduct and underage drinking convictions of Winters. The prior record of the witness in the case sub judice can be distinguished from the Eubanks, supra., witness because the prior convictions of Winters are unrelated to the present litigation.

We determine, that given the totality of the testimony concerning Winters, his status as a corrupt witness was quite evident to the jury. The record reveals that Mr. Winter's plea agreement was made known, as well as substantial argument with respect to his potential motive to testify against the defendants. One Commonwealth witness explained to the jury, with respect to Winters, that they "can't use a swan to do a rat's job." Accordingly, the Court will deny this point of error.

Next, defense alleges Court error through admission of the testimony of Kimberly Lynn Sauder, forensic scientist, when she had no courses in forensic chemistry, was still on a probationary status with the Pennsylvania State Crime Laboratory, and there was testimony that her supervisor did not work with her on a day-to-day basis. Defense maintains that the Commonwealth needed to show that she did her tests twice or that another verified her tests and results.

Ms. Sauder was qualified as an expert witness for the Commonwealth based on the evidence presented that she held a Bachelors of Science Degree in Chemistry from Penn State University, was given on-the-job training and was supervised. Although she was technically still on probation, she was permitted to work by herself and was supervised. She testified that all of her reviews had been satisfactory. She had additional work experience, and has been qualified as an expert in several other counties. Accordingly, we find no error in the admission of her testimony as an expert witness.

The next point of alleged error is that although the Commonwealth acknowledged that the alleged contraband had been tested by Prasad Dasgupta, it failed to show that the contraband tested by Dasgupta had not been altered, mixed, adulterated and that what Kimberly

Sauder tested was in fact that which the Commonwealth seized on July 6, 1991. We incorporate by reference our decision concerning the validity of the chain of custody of the drugs as stated above, and determine that the Court committed no error with its admission.

Finally, the defense alleges that the Commonwealth committed reversible error when it described, in its closing argument, the defense argument as a "smoke screen." The immediate objection to this characterization was addressed by the Court with a curative instruction to the jury to disregard any reference to a "smoke screen" and to make its own decision with respect to the defense based upon the facts as presented.

A mistrial is not mandated by every trial error. A mistrial is necessary only when the incident upon which the motion is based is of such a nature as to deny the defendant a fair trial. Com. v. Cannady, 404 Pa.Super. 215, 591 A.2d 356, 360 (1991). A mistrial is not necessary where cautionary instructions were adequate to overcome any prejudice. Com. v. Lawson, 519 Pa. 175, 185, 546 A.2d 589, 594 (1988).

Additionally, the totality of the Court's charge on the proper role of the jury to assess the facts which support their conclusions adequately covers those issues which are clearly the province of the jury. Accordingly, we find no error in the Court's refusal to grant a mistrial for the above stated reasons.

Accordingly, we will deny defendant, Randy Lee Kilgore's motion seeking an arrest of judgment and in

the alternative a new trial. We enter the following Order.

BY THE COURT,

/s/
President Judge Joseph E. Erb

Date: March 1, 1993

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY

COMMONWEALTH	:	2081 M.A. 1991
	:	
VS.	:	
	:	
RANDY LEE KILGORE	:	

(Suppression Hrg.)

York, Pa., Tuesday, October 1, 1991

Before the Honorable Joseph E. Erb, President Judge

APPEARANCES:

WILLIAM H. GRAFF, JR., Esquire
Assistant District Attorney
For the Commonwealth

ALLEN H. SMITH, Esquire
For the Defendant

* * *

TRANSCRIPT OF PROCEEDINGS

* * *

Reported by:

Karen Bellavia, RPR
Official Court Reporter

PROCEEDINGS

* * *

MR. GRAFF: This is Commonwealth of Pennsylvania versus Randy Lee Kilgore, 2081 of '91; the charge is delivery of cocaine, possession with intent to deliver cocaine, and criminal conspiracy to deliver cocaine.

This is the time and date set for a hearing on the motion to suppress the evidence alleging that the Commonwealth made an illegal search of the Defendant's truck.

We call Trooper Voggenreiter.

* * *

KURT E. VOGGENREITER, called as a witness, having been duly sworn according to law, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. GRAFF:

Q. State your full name and occupation, sir.

A. Kurt E. Voggenreiter, V-o-g-g-e-n-r-e-i-t-e-r, I'm a member of the Pennsylvania State Police.

Q. You specialize in narcotic investigations?

A. Yes, sir, that's correct.

Q. Were you on duty with the York County Drug Task Force on July 6th, 1991, at approximately seven p.m.?

A. I was.

Q. Were you at that time working in the area of Brogue with a unit of officers?

A. Yes, sir, that's correct.

Q. Did you set up a surveillance unit around the Brogue General Store?

A. Yes. We had a stationary surveillance unit and a roaming surveillance unit.

Q. You were working with a confidential informant at the time?

A. Yes.

Q. What game plan had you devised that particular day to buy cocaine and from whom?

A. The informant, in my presence, arranged with a Kelly Kilgore to buy and eighth kilo of cocaine.

The arrangements eventually decided upon were that the informant was to meet Kelly Kilgore at the Brogue General Store and that he was going to purchase an ounce of it; and if he and his made-up customer liked it, we would come back and buy the remainder of the eighth kilo.

Q. Did you provide money to the informant prior to the informant meeting Kelly Kilgore?

A. Yes, we did.

Q. Do you know Kelly Kilgore's relationship to this Defendant?

A. Yes, sir, I do. Kelly Kilgore is this Defendant's ex-wife.

Q. She's also been charged and has separate counts?

A. Yes.

Q. Were you in a surveillance point at the Brogue General Store at about 7:10 p.m. on that night?

A. Yes, I was.

Q. Who, if anyone, did you see meet with the informant?

A. We were in constant radio contact with each other, all the different units, and my position -- I wasn't in a position to see the actual meet myself. I saw the vehicle pull into the general area. I didn't see the actual meet.

The meet was described over the air by Detective Anthony Glowczewski, York County District Attorney's Office. He kept us posted as the -- he described it as a Camaro, I believe he said maroon in color, with a female.

Q. Was the person you later arrested known as Kelly Kilgore to you?

A. Yes, she was operating that Camaro.

Q. One or some of the units saw Kelly Kilgore meet with your informant?

A. Yes, get in the vehicle with the informant; and, in fact, Glowczewski said over the radio that, they're counting money.

Q. Was the plan, as you knew it, to receive the coke at that time?

A. No. Kelly was to come, see if the money was all there; then when she saw that the money was all right, she was going to take $1300 of the money to buy the ounce, and if we liked the ounce we were gonna come back and buy the rest of it then.

Q. At the time that meeting was taking place, were there other surveillance units already set up on this Defendant's home?

A. Yes.

Q. How far would that be from the Brogue General Store?

A. Probably a mile, not much more, not much less.

Q. Once Kelly Kilgore met with the informant, where did she go?

A. She left the Brogue General Store and drove directly to the residence that we later found out was her father's and where she was presently living, the one that was within a mile of the store.

Q. You remained at the Brogue General Store and other units were at this Defendant's residence?

A. That's correct.

Q. Did you at some point in time shortly thereafter see her return to the informant?

A. Yes, she returned within several minutes.

Q. And you didn't see where she went, but other units can testify that they had?

A. Yes.

Q. What happened when she got back?

A. Within a very short time, Glowczewski said the signal is given, take her down, and we converged on her vehicle and placed her under arrest.

I retrieved the evidence, which was a bag of white powder which later tested out positive for cocaine and which appeared to be approximately an ounce.

Q. But the original order was for four ounces?

A. Well, it was for an eighth of a kilo; but it was agreed that we were only gonna buy an ounce, check it out, and if we liked it go back and buy the rest.

Q. Did she have any of the money you originally provided to the informant?

A. No, she did not. The money that we gave the informant for the ounce was missing.

Q. After her arrest, you went with the other officers to this Defendant's residence?

A. Yes, the residence that was described to us by the other surveillance as the residence that she went to directly after she looked at the money.

Q. And did you search the house?

A. Yes. We were given a consentual -- we were given permission by the owner of the house, Mr. Brown, to search the house.

Q. The Defendant was present at the time?

A. He was.

Q. And his car -- was his car later searched?

A. I'm sorry?

Q. How did the car get searched, let's start with that?

A. We didn't find anything in the house. We knew that there was at least $1300 missing.

The money that we purchased the ounce for, within the short period of time between when it was given to Kelly Kilgore and when we arrived at the residence, it would have had to have been somewhere in that area, so we knew that was there.

We also knew that there was the remainder of the eighth ounce of cocaine -- or the eighth kilo of cocaine minus the ounce that we bought somewhere. We had reason to believe it was at the residence.

Therefore, a search of the residence did not turn up the cocaine, the remainder of the eighth kilo, so the only place left was the vehicle of the Defendant here.

It was then searched. And in the passenger -- on the passenger's side of the floor of the vehicle was a MacDonald's cup. The MacDonald's cup had the plastic cap on it, had a straw sticking out of it. When you took the cap off, there was napkins and wrappers balled up. Underneath this was more bags of what later tested positive for cocaine.

Q. That was turned over to you by Agent Way?

A. Yes, Agent Way found it, that's correct.

Q. Was this Defendant later interviewed by Detective Engle?

A. On the way back to the barracks after he was placed in the back of Engle's police car, he gave Detective Engle a statement.

Q. He had been advised of his Miranda rights?

A. Oh, yes. I myself advised him.

Q. Did he appear to understand them?

A. He definitely understood his rights.

Q. To your knowledge, did he waive those rights and basically confess to the offense. He confessed to the offense?

A. Yes, he did, yes.

MR. GRAFF: That's all I have of this witness.

* * *

CROSS-EXAMINATION

BY MR. SMITH:

Q. Officer, did you have a search warrant to search this Defendant's vehicle?

A. No, sir, we did not.

Q. Tell me how carefully you searched the house to look for the $1300 and to look for the remainder of what you believe was the cocaine.

A. It was not what I would term a thorough search.

Myself, I didn't believe that the father of Kelly Kilgore, the Defendant's ex-father-in-law, was involved in it. It was searched well enough that had a package of approximately four ounces of cocaine been around, it would have been seen.

When I first arrived at the door, I saw somebody run -- we heard shouts as we were approaching. It's about 50 -- oh, maybe 30 to 50 yards from the driveway to the house. So as we parked, we ran up to the house, we heard some commotion inside and I saw somebody bolt from the kitchen into the further reaches of the house.

I yelled "State Police," entered the house and the Defendant was coming out of the -- there were two living rooms in the house, he was coming out of the rear

living room; and it was my opinion that he was attempting to appear nonchalant. I gave a quick toss in the living room mainly looking for a weapon.

After we were given permission to search, I went back and looked a little more thoroughly, this time looking for the cocaine and/or the money. It later turned out that the money was in this room but it was under the carpet area. I think that's what you were alluding to.

Q. Now, when you searched the house the first time, you didn't find the money; is that correct?

A. That's correct, yes.

Q. How long after you searched did you find the money?

A. I believe it was the Defendant who told one of the officers where to look for the money.

Q. This was after you had searched his vehicle?

A. I'm not sure at what point that was. It could possibly have been after the vehicle was searched.

Q. He didn't make statements to anybody until after the vehicle was searched, did he?

A. No, that's correct.

Q. Did the Defendant make any statements to you or did he make them to Mr. Engle only?

A. The only thing he told me was, go ahead and search.

Q. What?

A. What?

Q. What.

A. I'm sorry.

Q. What did he mean, what did he say?

A. I'll give you the context of it. There was a period of time where Mr. Brown confronted his daughter out on the lawn. I was out there when this took place.

I went back into the house and I told Mr. Kilgore that he had the opportunity to save all this trouble for his father-in-law, to have his father-in-law's house torn apart; and I asked him if he wanted to be a man about it and he said, go ahead and search. He looked me in the eyes and said, go ahead and search.

Q. What, the house?

A. I'm just telling you what he said, he said, go ahead and search.

Q. Tell me exactly what you said you wanted to do.

A. I told him he could save his father-in-law a lot of problems, and if he was involved in it why let Kelly take the whole burden; and his reply to me was, go ahead and search.

Q. And what did you do?

A. Searched.

Q. What?

A. Everything, the house, and then eventually got to his vehicle.

Q. Did he say to you, you may search my car?

A. He did not use those words.

Q. Did you give you keys?

A. No.

Q. Was the car locked?

A. I don't recall. I wasn't the one who instituted the search on the vehicle. I don't recall if the keys were taken from him and we unlocked the truck or if it was unlocked. Maybe Agent Way could tell you that.

MR. SMITH: I have no further questions. Thank you.

* * *

REDIRECT EXAMINATION

BY MR. GRAFF:

Q. Let me ask you something, Trooper Voggenreiter; the car wasn't a junker, obviously an operable car?

A. Oh, yes, it was operable.

Q. What kind of car was it?

A. It was a Toyota pickup truck with a cap on the back, fairly late model. I have the year here somewhere, but it's a fairly late-model vehicle.

Q. Was it in the driveway?

A. Yes.

MR. GRAFF: That's all I have.

MR. SMITH: No further questions.

MR. GRAFF: We call Agent Way.

* * *

DONALD L. WAY, called as a witness, having been duly sworn according to law, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. GRAFF:

Q. Would you state your name and occupation for the record, sir.

A. Donald L. Way, W-a-y, narcotics agent for the State of Pennsylvania, Attorney General's Office.

Q. You specialize in narcotics investigation?

A. Yes.

Q. Were you on duty July 6th, 1991, as a part of the arrest of this Defendant?

A. Yes, I was.

Q. At the time the unit was set up in the Brogue General Store, where were you located?

A. I was located at an elementary school located on the same street as Mr. Kilgore's father-in-law. I was located at that store -- I mean at that school, excuse me.

Q. And you're in radio communication with all the other units at the time?

A. Yes, I was.

Q. Were you in a position to see the Camaro described by Trooper Voggenreiter arrive at the Brogue General Store?

A. I didn't see it -- I seen it come, but I didn't see it when it actually sat down and met with the informant, no.

Q. After it had been with the informant for a while, were you in a position to see that vehicle leave?

A. Yes, I was.

Q. Where did it go?

A. It went to her father's house, the residence where she was staying.

Q. Did you see it arrive, were you in a position to see it arrive?

A. Yes, I was.

Q. Did you see the Defendant at any time once that car arrived?

A. Yes, I did.

Q. Would you tell the Court what you saw when that Camaro came back to that residence.

A. When the Camaro went to the residence, I actually followed the vehicle up to the residence.

At the time that it arrived at the residence, Mr. Kilgore here was coming up from the direction of the house. I observed the young lady get out of the vehicle and walk towards the truck along with Mr. Kilgore.

Q. He was walking from the house to the truck?

A. He came from that direction, yes.

Q. And how long did the two of them meet at the truck?

A. Not very long. After -- I went down the road, turned around. By the time I turned around, they were walking back from the truck and she had gotten in her vehicle, and she actually pulled out behind me going down the highway.

Q. And did you follow her back down then to the Brogue General Store?

A. I didn't follow her into the store. I turned off again back at the school, and she proceeded to go in her direction towards the store.

Q. And that's where she was arrested?

A. Yes.

Q. And you were back at the residence; it's my understanding you searched the truck where the cocaine was found?

A. Yes, I did.

Q. And is what Trooper Voggenreiter described basically what you found?

A. Yes.

Q. Do you recall, if you know, whether the truck was locked?

A. When I searched the truck, the truck was open. I didn't use any keys to gain entry or anything. The doors were open when I went to search it.

MR. GRAFF: Your witness.

* * *

CROSS EXAMINATION

BY MR. SMITH:

Q. Who was the first one to go to the truck?

A. I really couldn't tell you who was the first one. I went to the residence first.

Q. What about Mr. Engle, what was his capacity at this point when the truck was there and you were there?

A. I believe Mr. Engle was at his car. He also was moving around in different locations. I don't think he was precisely stationary the whole time at his vehicle.

Q. Did you hear this Defendant make any comments or statements to Officer Voggenreiter?

A. No, I did not.

Q. Did this Defendant make any statements to you?

A. No, he did not.

MR. SMITH: No further questions. Thank you.

* * *

REDIRECT EXAMINATION

BY MR. GRAFF:

Q. Agent Way, while you're on the witness stand, your understanding of when you went to the truck to search is that somebody else had already looked through it?

A. Yes.

Q. And they didn't find the drugs?

A. That's correct.

Q. You conducted a more thorough search?

A. Yes.

Q. And found the drugs that you turned over to Trooper Voggenreiter?

A. Yes.

MR. GRAFF: Thank you.

MR. SMITH: No questions.

MR. GRAFF: That's all the evidence we intend to present, Your Honor.

THE COURT: Okay.

MR. SMITH: We have no testimony at this time.

MR. GRAFF: Our argument is just an automobile exception. They had probable cause to believe that the coke was in that truck. They had ordered four, she came back with one. She took our money.

We have every reason to believe since she didn't go to the house, she went to the truck to meet this Defendant, that the rest of the drugs were there, so no warrant was necessary. It was just a simple automobile exception to the warrant requirement.

MR. SMITH: Our position, Your Honor, was there was no probable cause and no authority to search this vehicle. There was no search warrant.

The police had searched the house, found nothing, and then on their own motion searched the truck and, of course, eventually found something but without authority to search it.

Our position is that the search was illegal, and any statements made by this Defendant after he was arrested would also be the fruits of an unlawful search and seizure and should be suppressed.

* * *

ORDER

The Court has heard the testimony with regard to the background of this case. The circumstantial evidence clearly supports the decision of the officers that there was a balance of cocaine that was left in the vicinity of where the delivery apparently was made to the person who delivered drugs at the Brogue Store. They had certainly probable cause to search. This is a vehicle.

The search of the house was searched with the consent of the owner. There was sufficient probable cause to arrest the Defendant.

It's not contested that he was given his Constitutional Rights and anything he said will not be suppressed, and the search of the car under the circumstances there was probable cause; and under the present law taking into consideration the totality of the circumstances, there was no need for a search warrant.

Accordingly, we enter the following Order:

AND NOW, to wit, this !st day of October, 1991, the Defendant's motion to suppress evidence is refused and denied, and we grant an exception.

* * *

END OF PROCEEDINGS

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

No. 95-1733

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

RANDY LEE KILGORE,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Where the owner of a vehicle is in custody, the vehicle is on private land under police control, police are available to get a warrant, there is no urgency to search the vehicle, and the owner fails to consent to a search, may police search the vehicle without a warrant?

COUNTERSTATEMENT OF THE CASE

The pickup truck in question was parked in a private driveway. Police saw defendant (owner) and Kelly Kilgore walk "toward" the truck, not "to" it. Police then lost sight of the couple for up to five minutes. There was no known entry or touching of the truck. Outbuildings were adjacent to it.

After a team of at least three police raided property, and took the defendant into custody, and had all residents and everything under control, they searched the truck and found cocaine in the bottom of a McDonald's cup not in plain view.

The Supreme Court of Pennsylvania suppressed the cocaine because there were no exigent circumstances justifying searching the truck without a warrant.

Petitioner is attempting to torture this decision into saying that the police may never make a warrantless search of an vehicle.

REASON FOR DENYING WRIT

COMMONWEALTH'S ARGUMENT TURNS THE HOLDING OF THE PENNSYLVANIA SUPREME COURT INTO A SWEEPING ABROGATION OF THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT, WHICH IT IS NOT. BECAUSE OF ITS UNIQUE FACTS, THIS CASE FALLS OUTSIDE THE AUTOMOBILE EXCEPTION IN THAT IT DOES NOT INVOLVE A CONSENT SEARCH, PLAIN VIEW, SUDDEN ENCOUNTER AND STOP, OR SEARCH INCIDENT TO ARREST. VEHICLES ARE NOT PER SE SEARCHABLE WITHOUT A WARRANT.

Most of the cases Commonwealth cites involve sudden encounter and stop (Johns, Thomas and Ross), or exigent circumstances (Carney) or plain view (White). The present

case simply falls outside the recognized exceptions to the warrant requirement, and therefore a warrant is required.

Commonwealth is attempting to make the automobile exception apply to all automobiles, per se, regardless of circumstances. An automobile is not a talisman in whose presence the Fourth Amendment fades away.

CONCLUSION

The writ should be denied.

Respectfully submitted,

Allen H. Smith, Esq.
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Supreme Court, U.S.
FILED
JUN 9 1996
CLERK

NO. 95-1738

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RANDY LEE KILGORE,
Respondent

Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In his counterstatement of the facts, respondent raises various cavils about the events leading up to the search (e.g., respondent walked "toward" the truck where the contraband was found, not "to" it). The implicit point appears to be that the police may have lacked probable cause for the search. The state court, however, found probable cause, and respondent does not argue to the contrary. The only issue at this stage is whether police needed a warrant to search the vehicle.

REPLY TO BRIEF IN OPPOSITION

In its certiorari petition, petitioner explained that this case warrants review because the Pennsylvania Supreme Court impermissibly grafted on to this Court's Fourth Amendment jurisprudence the requirement that the police, acting with probable cause, must first secure a motor vehicle and send other officers to obtain a warrant before searching it.

In response, respondent attempts to downplay the significance of the case by characterizing it as one of "unique facts" falling outside the automobile exception. He does so, however, by arguing that the automobile exception applies only in cases involving such extra factors as "a consent search," "plain view," "sudden encounter and stop," or "search incident to arrest."

This, however, is a fundamentally mistaken view of the automobile exception, which is the whole point of the certiorari petition. The Pennsylvania Supreme Court has held in this and a series of cases that the automobile exception requires something more than a showing of probable cause -- that it requires, in effect, an independent exception to the warrant requirement, such as an

exigent circumstance beyond the inherent mobility of the vehicle.

Respondent's argument, brief as it is, epitomizes exactly this erroneous understanding of Fourth Amendment law. The "automobile exception" is one of several distinct exceptions to the warrant requirement.[1] Because owners have a diminished expectation of privacy in their automobiles, as long as the police have probable cause to search a car, they may do so without a warrant. United States v. Ross, 456 U.S. 798 (1982).

If, as respondent and the Pennsylvania Supreme Court believe, the automobile exception instead requires the presence of some additional factor, such as exigent circumstances or consent, then it ceases to exist. A consensual search, for example, is valid without a warrant whether or not an automobile is involved. Under the analysis of respondent and the Pennsylvania Supreme Court, the automobile exception is swallowed up.

The cases cited by respondent make the point even clearer. Respondent states, for example, that the automobile exception was applied in California v. Carney, 471 U.S. 386 (1985), only because there were

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[1]Other exceptions to the warrant requirement include "hot pursuit," see Warden v. Hayden, 387 U.S. 294, (1967); "exigent circumstances," see United States v. Jeffers, 342 U.S. 48 (1951); "search incident to arrest," see Chimel v. California, 395 U.S. 752 (1969); border searches, see Almeida-Sanchez v. United States, 413 U.S. 266 (1973); consent searches, see Zap v. United States, 328 U.S. 624 (1946); and "plain view" searches, see Texas v. Brown, 460 U.S. 730 (1983).

exigent circumstances beyond the inherent mobility of the vehicle. The opposite is true. In Carney, government agents received information that marijuana was being exchanged for sex inside a certain motor home. On-site surveillance corroborated the allegation and the police entered the motor home without a warrant.

This Court did not uphold the warrantless search because of any exigencies beyond the inherent mobility of the vehicle. Indeed, there were none. Rather, the search was allowed under the "automobile exception" because, as with all motor vehicles, the accused had a diminished expectation of privacy in his trailer, and the agents had probable cause. No additional showing was necessary.

Respondent also points to Texas v. White, 423 U.S. 67 (1975), in which the automobile exception was supposedly applied only because probable cause resulted from a "plain view" discovery. That is not the case. In White, the police were informed that a man had just tried to negotiate four fraudulent checks at a nearby bank. They located the described car and driver and ordered him to stop on the road. As they did so, they noticed that the driver was trying to hide something between his legs, but they could not make out what it was. However, based on the description of the culprit and the car, they arrested the driver, drove the car to headquarters and searched it without a warrant.

This Court applied the automobile exception and held that once the police developed probable cause at the scene, their right to search the car did not abate simply because they drove the car to police headquarters before searching it. Respondent's contrary assertion notwithstanding, plain view played no role in White.

Finally, respondent suggests that the automobile exception applies only where a vehicle is suddenly encountered and stopped on the highway -- presumably, in respondent's thinking, a form of exigency. In support, he points to United States v. Johns, 469 U.S. 478 (1985), and United States v. Ross, supra. Respondent again mischaracterizes the case law.

In Johns, United States Customs officers developed information about a drug operation at a remote airstrip. Upon further investigation, they approached a truck near the airstrip and smelled a strong odor of marijuana. Although the officers had probable cause to search the truck at that point, they decided instead to drive it to a government warehouse and question the driver. Three days later, they searched the truck without a warrant. This Court upheld that delayed search not because of any "sudden encounter or stop" on the highway. The search was permitted because probable cause existed, and it did not disappear with the passage of time.

The application of the automobile exception in United States v. Ross likewise was not determined by assessing the circumstances under which the police first encountered the car. In Ross, a reliable informant told the police that a particular person was dealing drugs out of the trunk of a car at a described location. The police went to the scene to investigate, saw the person and car in question, and searched the car trunk. Later, the police again searched the car at headquarters. This Court upheld the searches both at the scene and at headquarters, regardless of whether any "sudden encounter or stop" or stop occurred. The searches were permitted because the police had probable cause and that was all the automobile exception required.

Actually, respondent's "sudden encounter" theory is inconsistent not just with precedent, but with his own argument. Once a car is stopped and the suspect is removed, the vehicle is unlikely to drive away by itself. Under the Fourth Amendment notions of respondent and the state court, the police should be required to secure a warrant at that point; the fact that the "encounter" began "suddenly" would not impair the ability to contact a magistrate after the stop has been made. Such reasoning, indeed, is exactly why the state court held in this case that the police should have guarded the vehicle and sent other officers off to track down a magistrate before conducting a search.

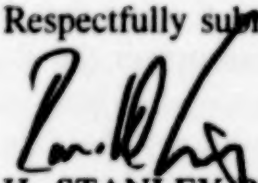
The problem with this rationale is that the ease of obtaining a warrant is simply not a question under the automobile exception. The existence of probable cause, in light of the reduced expectation of privacy in motor vehicles, is sufficient to support the exception. Respondent makes precisely the same error as the Pennsylvania Supreme Court: they have confused the conditions for the automobile exception with the conditions for other exceptions to the warrant requirement, such as exigent circumstances.

As a result, federal law is not applied in Pennsylvania in the same manner as in other states. The certiorari petition should be granted to address this divergence.

CONCLUSION

For these reasons, as well as those stated in the petition for writ of certiorari, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

95–1691 (5)

PENNSYLVANIA
v.
EDWIN LABRON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

95–1738 (H)

PENNSYLVANIA
v.
RANDY LEE KILGORE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

Nos. 95–1691 AND 95–1738. Decided July 1, 1996

PER CURIAM.

In these two cases, the Supreme Court of Pennsylvania held that the Fourth Amendment, as applied to the States through the Fourteenth, requires police to obtain a warrant before searching an automobile unless exigent circumstances are present. Because the holdings rest on an incorrect reading of the automobile exception to the Fourth Amendment's warrant requirement, we grant the petitions for certiorari and reverse.

In *Labron*, No. 95–1691, police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car from which the drugs had been produced, and found bags containing cocaine. The Pennsylvania Supreme Court agreed with the trial court (but not with the intermediate court of appeals, 428 Pa. Super. 616, 626 A. 2d 646 (1993), whose judgment it reversed) that this evidence should be suppressed. ___ Pa. ___, 669 A. 2d 917 (1995). After surveying our precedents on the automobile exception as

well as some of its own decisions, the court "conclude[d] that this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Id.*, at ___, 669 A.2d, at 924. Satisfied the police had time to secure a warrant, *id.*, at 924–925, the court held that "the warrantless search of this stationary vehicle violated constitutional guarantees," *id.*, ___, 669 A.2d, at 924.

In *Kilgore*, No. 95–1738, an undercover informant agreed to buy drugs from respondent Randy Lee Kilgore's accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made to a farmhouse where she met with Randy Kilgore and obtained the drugs. After the drugs were delivered and the Kilgores were arrested, police searched the farmhouse with the consent of its owner and also searched Randy Kilgore's pickup truck; they had seen the Kilgores walking to and from the truck, which was parked in the driveway of the farmhouse. The search turned up cocaine on the truck's floor. The trial court denied Randy Kilgore's motion to suppress the cocaine, holding the officers had probable cause to make the search. The appellate court affirmed. 437 Pa. Super. 491, 650 A. 2d 462 (1994). The Supreme Court of Pennsylvania reversed, citing *Labron* and holding that although there was probable cause to search the truck, ___ Pa. ___, ___, ___ A.2d ___, ___ (1995), the search violated the Fourth Amendment because no exigent circumstances justified the failure to obtain a warrant, ___, ___ A.2d, at ___.

The Supreme Court of Pennsylvania held the rule permitting warrantless searches of automobiles is limited to cases where "'unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.'" (emphasis deleted) ___ Pa., at ___, 669 A. 2d, at 924, quoting *Commonwealth* v. *White*, ___ Pa. ___, ___, 669 A. 2d 896, 901 (1995). This was incorrect. Our first cases establishing the automobile

exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. *California* v. *Carney*, 471 U. S. 386, 390–391 (1985) (tracing the history of the exception); *Carroll* v. *United States*, 267 U. S. 132 (1925). More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. *Carney, supra*, at 391–392. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more. *Carney, supra*, at 393. As the state courts found, there was probable cause in both of these cases: Police had seen respondent Labron put drugs in the trunk of the car they searched, and had seen respondent Kilgore act in ways that suggested he had drugs in his truck. We conclude the searches of the automobiles in these cases did not violate the Fourth Amendment.

Respondent Labron claims we have no jurisdiction to review the judgment in his case because the Pennsylvania Supreme Court's opinion rests on an adequate and independent state ground, viz., "this Commonwealth's jurisprudence of the automobile exception." ___ Pa., at ___, 669 A. 2d, at 924. We disagree. The language we have quoted is not a "plain statement" sufficient to tell us "the federal cases [were] being used only for the purpose of guidance, and d[id] not themselves compel the result that the court ha[d] reached." *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception, see, *e. g.*, ___ Pa., at ___, 669 A. 2d, at 921 (observing *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978), cited *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971)); ___ Pa., at ___, 669 A. 2d, at 924

(stating *Commonwealth* v. *White, supra,* rested in part upon the Pennsylvania Supreme Court's analysis of *Chambers* v. *Maroney,* 399 U. S. 42 (1970)). The law of the Commonwealth thus appears to us "interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long,* 463 U. S., at 1040–1041. Our jurisdiction in Labron's case is secure. *Ibid.* The opinion in respondent Kilgore's case, meanwhile, rests on an explicit conclusion that the officers' conduct violated the Fourth Amendment; we have jurisdiction to review this judgment as well.

Respondent Labron's motion to proceed *in forma pauperis* is granted. The petitions for writs of certiorari are granted, the judgments of the Supreme Court of Pennsylvania are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

95–1691

PENNSYLVANIA
v.
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

95–1738

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

Nos. 95–1691 AND 95–1738. Decided July 1, 1996

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The decisions that the Court summarily reverses today are two of a trilogy of cases decided by the Pennsylvania Supreme Court within three days of each other. See *Commonwealth* v. *Kilgore*, ___ Pa. ___, ___ A. 2d ___ (1995) (1995 WL 790060); *Commonwealth* v. *White*, 669 A. 2d 896 (1995); *Commonwealth* v. *Labron*, ___ Pa. ___, 669 A. 2d 917 (1995).[1] In each case, that court concluded that citizens of Pennsylvania are protected from warrantless searches and seizures of their automobiles absent exigent circumstances. But a fair reading of both *White* (the holding of which the Commonwealth has not challenged in this Court) and *Labron* (which the Court reverses today) demonstrates that their judgments almost certainly rested upon the Pennsylvania court's

[1]Each decision was issued by a different division of the Pennsylvania Supreme Court.

independent consideration of its own Constitution. For that reason, I do not believe that we have jurisdiction over the decision in *Labron*, just as we would not have jurisdiction in *White*. See 28 U. S. C. §1257(a).[2] Furthermore, when considered in light of those two more carefully reasoned decisions, there is no reason for this Court to disturb the state court's finding in *Kilgore*, since the result will almost certainly be affirmed on remand.

In its *per curiam* decision, this Court concludes that because the decision in *Labron* cited state decisions which in turn referred to two 25-year-old cases of this Court, any reference to state law is "'interwoven with the federal law.'" *Ante*, at 4 (citing *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983)). These references, however, seem to me a rather short thread with which to weave—let alone upon which to hang—our jurisdiction.

In my opinion, the best reading of *Labron*'s plain language is that it relied on adequate and independent state grounds. The majority decision below includes references to four sources of federal law: The Federal Constitution and three federal cases. None of the references demonstrates that the decision rested upon anything other than state law.

The decision begins with the proposition, not at issue here, that "the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution generally require that searches be predicated upon a warrant issued by a neutral and detached magistrate." ___ Pa. ___, ___, 669 A. 2d 917, 920 (1995) (citations omitted). It then reviews the history of the

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[2]Even if, as the Court concludes, *ante*, at 3–4, some element of residual doubt suggests that Pennsylvania's Supreme Court drew inspiration from our interpretations of the Federal Constitution, I do not think that reliance sufficient to justify expending this Court's time—or that of the Pennsylvania Supreme Court—simply to scour the state decisions of all references to the Federal Constitution. See *infra*, at 6–11.

so-called "automobile exception" to the warrant requirement by quoting several passages from our decision in *Carroll* v. *United States*, 267 U. S. 132 (1925), which first established the exception, and then quotes a passage from *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970),[3] which appears to support the proposition under Federal law that the Court emphasizes here today (that the existence of probable cause is sufficient in and of itself to justify a search of a vehicle). ___ Pa., at ___-___, 669 A. 2d, at 920–921.

Rather than follow the developments of federal law, however, the decision then specifically and immediately notes that "[w]hen reviewing warrantless automobile searches *in this Commonwealth*, we have constantly held that 'there is no "automobile exception" as such and [that] the constitutional protections are applicable to searches and seizures of a person's car.' *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978) (citing *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971))." ___ Pa., at ___, 669 A. 2d, at 921 (emphasis added). From that point onward, the only reference to federal law in the decision's remaining 30 citations is a recognition that *White*, the sole decision of this trio of "exigent circumstance" cases that is not before our Court, was "based upon" that Court's analysis of *Chambers*. *Id.*, at ___, 669 A. 2d, at 923–924. Every other citation in *Labron* is to Pennsylvania law.

Because *White* was issued on the same day as *Labron* and reached an identical conclusion regarding the "exigent circumstances" rule, that decision is worth reviewing. In *White*, the court hesitated before consid-

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[3] As the Pennsylvania Supreme Court noted, in *Chambers* we held that "'[f]or constitutional purposes, [there is] no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.'" ___ Pa. ___, ___, 669 A.2d 917, 921 (1995) (quoting *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970)).

ering the merits of the case "to address the Commonwealth's claim that White has waived his claim that the search of his automobile was illegal under Article I, Section 8 of the Pennsylvania Constitution because he did not set forth his state constitutional claims in the manner required." The Commonwealth's claim, the Court found, was "meritless." "White clearly raises a claim under the Pennsylvania Constitution, cites cases in support of his claim, and relates the cases to the claim. That is sufficient." ___ Pa., at ___, 669 A. 2d, at 899.

Having established the importance of the state constitutional claim to the defendant's argument, *White* went on to discuss the "exigent circumstance" exception at issue here in light of both federal and state law. And although the court's analysis relied upon our decision in *Chambers* v. *Maroney*, it cited none of the subsequent cases in which this Court has effectively converted the "automobile exception" into a absolute rule allowing searches in the presence of probable cause. See ___ Pa., at ___, 669 A. 2d, at 899–901; n. 6, *infra* (noting that the Pennsylvania courts' failure to refer to this Court's subsequent decisions in this area may be intentional rather than ignorant). Stressing the independent evaluation it makes of its State Constitution, the Pennsylvania court also rejected our decision in *New York* v. *Belton*, 453 U. S. 454 (1981) on state constitutional grounds. See ___ Pa., at ___, 669 A. 2d, at 902–903.[4]

Notably, the Commonwealth has not asked this Court to review the Pennsylvania court's decision in *White*,

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[4]Although the court's main opinion in *Commonwealth* v. *White*, 669 A. 2d 896 (1995), also asked whether the search would have been permissible as a search incident to an arrest, the dissent later noted that the only question presented in the appeal was whether "exigent circumstances" were necessary to permit a warrantless search of a car based on probable cause. See *Id.*, at ___, 669 A. 2d, at 910.

even though the search in that case would be affirmed under the Commonwealth's and this Court's understanding of Pennsylvania's holding regarding exigent circumstances. I also note that lower state courts have explicitly read *White* as establishing a state constitutional right, not a federal right. *Commonwealth* v. *Haskins*, 1996 WL 183880, *2 (Pa. Super., Apr. 18, 1996) ("In order to search an automobile without a warrant, the police must still show the existence of both probable cause and exigent circumstances. *Commonwealth* v. *White*, ___ Pa. ___, 669 A. 2d 896 (1996). . . . In *White*, our Supreme Court reiterated that the Pennsylvania Constitution requires such a showing"); see also *Commonwealth* v. *Yedinak*, 1996 WL 179935, *5, n. 5 (Pa. Super., Apr. 11, 1996) ("The Pennsylvania Supreme Court recently held that the Pennsylvania Constitution provides greater protection than the United States Constitution with regard to automobile searches in *Commonwealth* v. *White*").

The lower courts' understanding regarding the state-law nature of *White*—and my understanding of the state-law nature of *Labron* as well—is almost perfectly reflected in the dissents to each case that were penned by Justice Castille. In both instances, Justice Castille recognizes, even more explicitly than the majority, that the decisions were based on state law.

In *Labron*, for instance, his main point was that the defendant had no standing to challenge the constitutionality of the search of a car that he did not own. In making his argument, however, he noted that "the majority correctly characterizes *Pennsylvania law* regarding the 'automobile exception' to the warrant requirement." ___ Pa., at ___, 669 A. 2d, at 926 (emphasis added). And although he reviewed decisions of this Court on standing to claim violations of the Fourth Amendment, he went on to note: "*Under Article I, Section 8 of the Pennsylvania Constitution*, however, this Court looks to several additional factors to determine whether a criminal defendant has standing to challenge

the admission of evidence against him." *Id.*, at ___, 669 A. 2d, at 927.

In *White*, Justice Castille stated that he believed that "the automobile exception to the warrant requirements of *this Commonwealth* should be a *per se* rule regardless of how much time police may have to obtain a warrant," *id.*, at ___, 669 A. 2d, at 909 (emphasis added), and he further concluded that he would "urge the adoption of a bright line rule that would allow warrantless searches of all automobiles for which police have independent probable cause," *id.*, at ___, 669 A. 2d, at 909–910. Of course, if Justice Castille were interpreting federal, rather than state, law, he would not have the luxury of "urging the adoption" of a particular rule.[5]

Having reviewed the range of the Pennsylvania courts' statements regarding the source of the "exigent circumstances" rule, it is worthwhile to review this Court's understanding of when a state decision is based on adequate and independent state grounds. In *Michigan* v. *Long*, the Court adopted a "plain statement" rule for determining whether a state decision rested on "independent and adequate" state-law grounds. "Because of [our] respect for state courts, and [a] desire to avoid advisory opinions, . . . we [did] not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions." 463 U. S., at 1040. When "a state court decision fairly appears to rest *primarily* on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," we held, we would

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[5]Justice Castille also specifically noted that the *Belton* decision was not raised by the parties, and that the majority's discussion of it was dicta, further emphasizing that his emphasis on Pennsylvania law was related to the sole issue that he believed presented: Whether a warrantless search of an automobile requires both probable cause and an exigent circumstance.

conclude that the State decided as it did because federal law required it to do so. *Id.*, at 1040–1041.

Given the explicit and nearly exclusive references to state law that I review above, it seems to me that the Court's decision to take jurisdiction in *Labron* not only extends *Michigan* v. *Long* beyond its original scope, but it stands its rationale on its head. *Labron* does not rest "primarily" on federal law; as Justice Castille understood it, as the briefing in *White* understood it, and as the Commonwealth's decision to stay out of *White* demonstrates, every indication is that the rule adopted in *Labron* and *White* rests primarily on state law. Nor are these holdings "interwoven" with federal law: Both *Labron* and *White* cite only two federal cases, both over a quarter-century old; rather than implicitly conclude that the absence of any reference to more recent decisions is due to poor legal research, I would trust the Pennsylvania courts' ability to understand and choose to deviate from our federal law. Certainly it would be a more respectful approach, in a case where the question is as close as it is in this case, to conclude that the State had made a conscious decision to depart from the jurisprudence of this Court rather than an error of law.[6]

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[6]Indeed, the author of *Labron* noted in *White* that "the history of Article I, Section 8 and case-law interpreting it reveal a history of according a limited expectation of privacy in an automobile independently under the Pennsylvania Constitution. Therefore, the question before us today is not whether we wish to extend additional privacy protections to the Appellant but whether we wish to follow the United States Supreme Court and sharply curtail a privacy interest long recognized by this Court." *Commonwealth* v. *White*, ___ Pa., at ___, 669 A. 2d, at 905.

To this end, I find it particularly interesting that only two Pennsylvania courts have cited the decision in *California* v. *Carney*, 471 U. S. 386 (1985), upon which the *per curiam* decision relies as modern support for its interpretation of federal constitutional law. See *Commonwealth* v. *Rosenfelt*, 443 Pa. Super. 616, 632–634, 662 A. 2d 1131, 1139 (1995); *Commonwealth* v. *Camacho*, 425 Pa. Super. 567, 625 A. 2d 1242 (1995). Each of those decisions expressly noted

The nature of the Pennsylvania Court's reliance on federal law in these cases, therefore, is quite different from that which spurred the Court to conclude in *Michigan* v. *Long* that the judgment of the Michigan Supreme Court had not relied on adequate and independent state grounds. There, as the Court noted, the decision below "referred twice to the State Constitution in its opinion, but otherwise relied *exclusively* on federal law." *Id.*, at 1037 (emphasis added). The dissents below also relied explicitly and *exclusively* on decisions of this Court. *Id.*, at 1037, n. 2; *Michigan* v. *Long*, 413 Mich. 461, 473–486, 320 N. W. 2d 866, 870–875 (1982) (Coleman, C. J., dissenting, Moody, J., concurring in part and dissenting in part). Indeed, the critical holding of the Court was that the Michigan "Court of Appeals erroneously applied the principles of *Terry* v. *Ohio*." *Id.*, at

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the presence of conflict between federal and state law on this issue.

In *Camacho*, the Superior Court noted "the discrepancy between some of the Commonwealth's past cases and federal cases which speak to automobile searches" in cases like those at issue here. *Id.*, at 576, n. 2, 625 A. 2d, at 1247, n. 2. After reviewing the holding in *Carney*, the Court noted that the state cases concluding that there was no *per se* "'automobile exception'" were "simply dated and not in keeping with the tenor of current law." *Id.*, at 577, n. 2, 625 A.2d, at 1247, n. 2.

The Court in *Rosenfelt* reached an alternative explanation for the conflict—and a result identical to that reached in the cases reversed by the Court today. There, the defendant agreed that the search of the vehicle was not illegal under federal law. Citing *Carney*, the Court noted that the federal "automobile exception" had "jettison[ed]" the requirement of exigency, essentially converting the exception into a *per se* rule allowing a search once probable cause exists. See 443 Pa. Super., at 633, 644–645, 662 A. 2d, at 1139, 1145. Noting that the State Constitution could extend greater protections to Pennsylvania citizens than did the Federal Constitution, but that its Supreme Court had not yet decided whether that was the case, the Superior Court went on to review the issue on its own and found a state constitutional violation. *Ibid.* After it decided the cases at issue here, the Pennsylvania Supreme Court denied the Commonwealth's appeal. See 674 A. 2d 1070 (1996) (table).

471, 320 N. W. 2d, at 869 (citation omitted).[7] The opinion in this case presents almost precisely the opposite situation: The decision refers to the Federal Constitution once, but otherwise relies *exclusively* on state law.

For these reasons, just as the decision in *White* would not merit summary reversal were it before this Court, the decision in *Labron* should not be summarily reversed. Although *Labron* and *White* both touch upon, and even place some historical reliance upon, federal search and seizure law, each also recognizes the broad interpretation that the Pennsylvania court has given its own constitutional prohibition against warrantless searches. I therefore seriously question whether respect for the reasoning, independence, and resources of the Pennsylvania court will be advanced by today's decision.

While *Kilgore* relies more explicitly on the Federal Constitution than the other two decisions, it decided the identical issue that was decided in *Labron* and *White*

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[7] On the many subsequent occasions in which this Court has taken jurisdiction over state decisions over which there was some dispute about the nature of the relationship between federal and state law, the state opinions were far more "interwoven" with federal law than is true in this case. See, *e.g.*, *Illinois* v. *Rodriguez*, 497 U. S. 177, 182 (1990) (decision below did not "rely on (or even mention) any specific provision" of State Constitution); *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (state constitutional provision construed to provide protections identical to Federal Constitution); *Florida* v. *Riley*, 488 U. S. 445, 448, n. 1 (1989) (decision below mentioned State Constitution only twice, but "focused exclusively on federal cases dealing with the Fourth Amendment"); *Michigan* v. *Chesternut*, 486 U. S. 567, 571, n. 3 (1988) (decision below "said nothing to suggest that the Michigan Constitution's seizure provision provided an independent source of relief, and the court's entire analysis rested expressly on the Fourth Amendment and federal cases"); *Kentucky* v. *Stincer*, 482 U. S. 730, 735, n. 7 (1987) (decision below "consistently referred to respondent's rights under the . . . Federal Constitution as supporting its ruling"); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987) (State Constitution construed *in pari materia* with Federal Constitution).

only three days before those decisions issued. The reference to the Federal Constitution upon which the Court rests its jurisdiction—only one of two references to federal law—must be read in the context of the other two decisions, each of which relied heavily upon the Commonwealth's own Constitution. In light of *Labron* and *White*, the judgment in *Kilgore* will almost certainly remain the same on remand. In such a circumstance, the rationales supporting the rule of *Michigan* v. *Long* simply do not support the decision to reverse. The petition in *Kilgore* should simply be denied.

On many prior occasions, I have noted the unfortunate effects of the rule of *Michigan* v. *Long*. See, *e.g.*, *Harris* v. *Reed*, 489 U. S. 255, 266–267 (1989) (STEVENS, J., concurring); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 689–708 (1986) (STEVENS, J., dissenting); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) (STEVENS, J., dissenting); *Ponte* v. *Real*, 471 U. S. 491, 501–503 (1985) (STEVENS, J., concurring in part); see also *Arizona* v. *Evans*, 514 U. S. ___, ___-___ (1995) (GINSBURG, J., dissenting). Because the state-law ground supporting these judgments is so much clearer than has been true on most prior occasions, see n. 5, *supra*, these decisions exacerbate those effects to a nearly intolerable degree. Particularly in light of my understanding of this Court's primary role—"to protect the rights of the individual that are embodied in the Federal Constitution," *Harris*, 489 U. S., at 267—the decision to summarily reverse state decisions resting tenuously at best on federal grounds is imprudent and entirely inconsistent "with the sound administration of this Court's discretionary docket." *Ponte*, 471 U. S., at 502–503.

The Pennsylvania Court has in this and other cases expressly indicated its intent to extend the protections of its constitution beyond those available under the Federal Constitution, see, *e.g.*, *Commonwealth* v. *Edmunds*, 526 Pa. 374, 586 A. 2d 887 (1991) (setting forth test for establishing rights under Pennsylvania Constitution); *Commonwealth* v. *Rosenfelt*, 443 Pa. Su-

per. 616, 634–637, 662 A. 2d 1131, 1140–1141 (1995) (reviewing state cases extending greater protections under the Pennsylvania Constitution). The *per curiam* decision that the Court issues today merely makes that task harder by requiring the Commonwealth to purge its decisions of any reliance on the latter, despite the value of the insights that our decisions can provide on related issues of law. By "unceremoniously reversing its judgment," *Van Arsdall*, 475 U. S., at 701 (STEVENS, J., dissenting), we also demonstrate a lack of respect for the Pennsylvania court and the sophistication of its state search and seizure law. See *id.*, at 699.

These harms are particularly unnecessary given the likely result on remand. To reinvigorate the privacy protections extended to Pennsylvania citizens under *Labron*, *Kilgore*, and *White*, the Pennsylvania Supreme Court need only set forth the appropriate talismanic language and state, even more clearly than it already has, that the "*Commonwealth's* jurisprudence of the automobile exception [requires] both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Labron*, ___ Pa., at ___, 669 A.2d, at 924 (emphasis added).[8] While the result will be identical, resources and respect will have been unnecessarily lost.

I respectfully dissent.

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[8]State courts have, of course, done this on many occasions in the past. See, *e.g.*, *Ponte* v. *Real*, 471 U. S. 491, 503, n. 4 (1985) (STEVENS, J., concurring in part) (listing various cases in which reversals by this Court were followed by state court decisions affirming the original holding on state-law grounds); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) (STEVENS, J., dissenting) (same).